Supreme Court, U.S.
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No.

In the Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,

Petitioner,

v.

REEDER-SIMCO GMC, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID L. WILLIAMS
MICHAEL N. SHANNON
Rose Law Firm
A Professional Association
120 East Fourth Street
Little Rock, Arkansas 72201
(501) 375-9131

ROY T. ENGLERT, JR.*
DONALD J. RUSSELL
MAX HUFFMAN
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

**Counsel of Record*

QUESTIONS PRESENTED

The Robinson-Patman Act prohibits specified forms of price discrimination "between different purchasers" where the effect of "such discrimination" may be harm to competition "with any person who * * * knowingly receives the benefit of such discrimination." The questions presented are:

1. Whether an unaccepted offer that does not lead to a purchase – so that there is not "discriminat[ion] * * * between different purchasers" as the statutory language contemplates – may be the basis for liability under the Act.

2. Whether the Act permits recovery of damages by a disfavored purchaser that does lose sales or profits to a competitor that does *not* purchase from the defendant, but does not lose sales or profits to any purchaser that "receives the benefit of" the defendant's price discrimination.

PARTIES TO THE PROCEEDING

The petitioner is Volvo Trucks North America, Inc., defendant-appellant in the courts below. The respondent, plaintiff-appellee in the courts below, is Reeder-Simco GMC, Inc.

RULE 29.6 STATEMENT

Volvo Trucks North America, Inc., is a wholly owned subsidiary of VNA Holdings, Inc., which is a wholly owned subsidiary of AB Volvo, a publicly traded corporation.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The majority and dissenting opinions of the Eighth Circuit (App., *infra*, 1a-32a) are reported at 374 F.3d 701. The district court's judgment (App., *infra*, 33a-34a) and order denying judgment as a matter of law (App., *infra*, 35a) are unreported. The district court's order on the jury verdict (App., *infra*, 36a-39a) and order granting summary judgment in part (App., *infra*, 40a-42a) also are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2004. The order of the court of appeals denying rehearing (App., *infra*, 43a-44a) was entered on October 6, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), makes it unlawful

> to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition or * * * to injure, destroy, or prevent competition with any person who * * * knowingly receives the benefit of such discrimination.

STATEMENT

A divided panel of the Eighth Circuit has dramatically extended the reach of the Robinson-Patman Act (RPA), which prohibits certain forms of price discrimination. The RPA makes it unlawful, in defined circumstances, for a seller "to discriminate in price between different purchasers * * * where the effect of such discrimination may be * * * to injure, destroy, or prevent competition with any person who * * * knowingly receives the benefit of such discrimination." 15 U.S.C. § 13(a).

Before the Eighth Circuit's decision, courts consistently held that the RPA means what it says when it forbids discrimination between "purchasers" – liability cannot arise from a discriminatory *offer* to sell that does not result in a purchase. Moreover, discrimination between purchasers is not *per se* illegal. Even the most expansive interpretations of the RPA (before the Eighth Circuit's decision here) have construed the statute to protect only competition between favored and disfavored purchasers – not to protect disfavored purchasers from disadvantage when they are competing against other firms that do not purchase the defendant's products. The Eighth Circuit has extended the statutory prohibition beyond its settled meaning by ignoring both of those principles. *Every* incident of alleged discrimination in this case involved either a mere offer to sell (rather than a purchase) or a contention that the plaintiff lost sales or profits to a competitor that did not buy the defendant's products (rather than to a favored purchaser).

The court's errors expand the coverage of the RPA to encompass common and procompetitive pricing practices that previously had been regarded as categorically permissible under the RPA. The decision below comes dangerously close to stating a blanket condemnation of all price differences in the sale of products and conflicts with the plain language of the statute, the decisions of other courts of appeals, and the fundamental policies that underlie the antitrust laws.

The consequences of these errors extend far beyond this case and beyond the boundaries of the Eighth Circuit. The Chair of the Section of Antitrust Law of the American Bar Association observed in 2003 that "[a]rguably[] more business decisions are affected by the Robinson-Patman Act than by any other antitrust law because so many interstate sales and dealer-oriented promotions of commodities are subject to its terms." Robert T. Joseph, *From the Section Chair*, ANTITRUST, Summer 2003, at 3. Because any business that distributes its products

nationally may be sued for treble damages under the RPA in the Eighth Circuit, the decision may deter procompetitive discounting in a large portion of the economy.

A. Volvo's Product Distribution Practices

Petitioner Volvo Trucks North America, Inc. (Volvo) manufactures a broad line of heavy trucks for both highway and vocational (*e.g.*, dump trucks and mixer trucks) use, in competition with other manufacturers such as Freightliner, International, Peterbilt, and Kenworth. Volvo, like other heavy truck manufacturers, offers several different base models of trucks, each of which can be built to a user's precise specifications, using a variety of different engines, transmissions, brakes, axles, suspensions, and other components.

Volvo distributes its trucks throughout the United States through a network of independent dealers, who sell to retail customers such as trucking companies. These retail customers typically solicit competitive bids from several dealers representing different manufacturers, and then purchase from the dealer offering the most attractive bid. Most trucks are built to order after the retail customer has contracted to buy from a dealer. App., *infra*, 2a. It would be prohibitively expensive for a dealer to maintain an inventory of trucks sufficient to meet the widely diverse needs of its potential retail customers. Therefore, during the competitive bidding process Volvo *offers* to sell trucks to its dealers that will meet the retail customer's specifications, and its dealers offer to sell those trucks to the retail customer. A dealer *purchases* the trucks from Volvo only if the retail customer accepts the dealer's bid.

Volvo offers a base wholesale price to its dealers that is 80% of its published retail price. App., *infra*, 2a. During the competitive bidding process, however, dealers often seek an additional discount, or "concession," from the base wholesale price – a discount that permits the dealer, if it independently

decides to do so, to submit a lower bid to the potential retail customer. *Ibid.* Volvo's district sales managers are authorized but not required to offer such discounts up to amounts specified in a matrix that Volvo does not disclose to its dealers or to the public. C.A. ER 1600, 1610-1613. Higher-level personnel from Volvo's headquarters are authorized but not required to offer even larger discounts. See *id.* at 1619. Volvo decides on a case-by-case basis whether to offer a discount and how large such a discount will be, after considering the circumstances of a specific bidding situation. *Id.* at 1622-1623. For example, Volvo may offer a larger discount if its assembly plant is operating well below capacity or if industry-wide demand for trucks is declining. *Id.* at 1606, 1609. It may offer a larger discount for a retail customer that has historically purchased a different brand of truck, and may offer an even greater discount if that customer is expected to purchase a large number of trucks in the future. *Id.* at 1608-1609. Because of these and other factors that vary over time and from one retail customer to another, Volvo frequently offers a different discount – and hence a different price – to a dealer in connection with a bid to one retail customer than it offers to that dealer (or to another dealer) in connection with a bid to a different retail customer. *Id.* at 1617-1618; 1622-1623. Other truck manufacturers use similar pricing practices. *Id.* at 1609, 1612.[1]

When two or more Volvo dealers are competing to sell to the same retail customer, Volvo offers the same discount to each. C.A. ER 1620-1621. Head-to-head competition between Volvo dealers for the same customer, however, is the exception rather than the rule. *Ibid.* Most retail customers solicit a bid from only one Volvo dealer.

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[1] Ford's pricing practices, similar in all material respects, were held not to violate the RPA in *Metro Ford Truck Sales, Inc.* v. *Ford Motor Co.*, 145 F.3d 320 (5th Cir. 1998), cert. denied, 525 U.S. 1068 (1999).

B. Reeder's Robinson-Patman Act Claims

Respondent Reeder-Simco GMC, Inc. (Reeder) is a truck dealer located in Fort Smith, Arkansas. App., *infra*, 2a. In 1995, Reeder entered into a five-year franchise agreement with Volvo, with provisions for automatic one-year extensions if Reeder met certain sales objectives that were to be unilaterally determined by Volvo. App., *infra*, 2a. Volvo placed Reeder on "probationary" status when it failed to meet those objectives in 1995 and 1996. C.A. ER 1109; 1138-1139; see *id.* at 1651. After Reeder failed to meet the objectives in 1997 and 1998, Volvo notified Reeder that, if it did not meet the 1999 objectives, its franchise would be terminated effective March 31, 2000. Reeder C.A. Br. 4-5; see also C.A. ER 1651. In February 2000, Reeder sued Volvo, alleging among other things that Volvo had violated the Robinson-Patman Act.[2] App., *infra*, 3a.

At trial, Reeder supported its RPA claim with evidence of selected transactions involving specific retail customers. Reeder produced evidence concerning its sales to four different retail customers and, for each sale, identified a *different* Volvo dealer that sold to a *different* retail customer in an entirely separate transaction. App., *infra*, 4a-6a. Reeder then compared the discount it received from Volvo in connection with its retail sale and the discount Volvo extended to the other Volvo dealer in connection with the other dealer's sale to a *different* retail customer. In each pair of transactions selected by Reeder for these "sales-to-sales" comparisons, Volvo's discount to Reeder was lower than its discount to the other dealer. *Ibid.* Reeder asserted that it would have earned greater profits on each of these sales if Volvo had granted to Reeder the same discount

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[2] Reeder also alleged a violation of the Arkansas Franchise Practices Act, Ark. Code Ann. §§ 4-72-201 to 4-72-209. App., *infra*, 2a. The district court entered a judgment in favor of Reeder on this claim that was affirmed by the court of appeals. That judgment is not challenged in this petition.

that it granted to the other Volvo dealer in connection with the different sale to which it was compared.

Reeder also introduced evidence concerning a large number of unsuccessful bids it submitted to potential retail customers. App., *infra*, 6a. For twelve of these unsuccessful bids, Reeder identified successful bids by other Volvo dealers that resulted in sales to *different* retail customers in unrelated transactions. In each of these "offers-to-sales" comparisons, Reeder was offered a discount (but did not purchase at that discount, because its bid to the customer was unsuccessful) that was less than the discounts at which other dealers purchased from Volvo for resale to *different* retail customers. *Ibid.* Reeder asserted that its bids would have been successful if Volvo had offered it the same discounts that Volvo granted to the other dealers in the separate transactions to which they were compared.

Reeder did not compete against another Volvo dealer in *any* of the bids that were examined in the sales-to-sales or in the offers-to-sales comparisons. In each of the offers-to-sales comparisons, Reeder claimed that it lost a sale *to a non-Volvo dealer* but could have made the sale if Volvo had offered a lower price. App., *infra*, 6a. In each of the sales-to-sales comparisons, Reeder claimed that its profits would have been greater if it could have paid a lower price to Volvo. *Id.* at 4a-6a; see also C.A. ER 149-157. Reeder made no claim that it reduced its price to the retail customer because of competition from another Volvo dealer, because there was no competing bid from another Volvo dealer for any of those sales.

Reeder claimed to have bid to sell more than 5000 trucks (C.A. ER 1159-1161), but it produced evidence of only two instances of claimed discrimination in which Reeder and another Volvo dealer were involved in "head-to-head" competition for the same potential sale. App., *infra*, 12a. In one of these head-to-head comparisons, Reeder competed with Southwest Missouri Truck Center to sell twelve trucks to Hiland Dairy. In

January 1999 Southwest requested and was offered a 7.5% discount; Reeder subsequently requested a 12% discount but was offered only the 7.5% that Volvo had previously offered to Southwest. *Id.* at 4a. Hiland did not make its purchasing decision until August 1999, however and in the intervening period Volvo increased its base wholesale price. Hiland indicated it would purchase from Southwest but demanded the price that had been quoted in January. In response, to compensate for the intervening increase in its base price, Volvo agreed to increase its discount to Southwest to 8.5%. C.A. ER 1627; see also App., *infra*, 4a.

In the only other head-to-head comparison Reeder identified – a bid to sell five trucks to Tommy Davidson (App., *infra*, 12a) – Volvo offered an 18.9% discount to Reeder and to the other Volvo dealer, but Reeder complained that it was offered the 18.9% discount too late, and lost credibility with the customer as a result. C.A. ER 1271-1272. Tommy Davidson chose not to purchase from either Reeder or the other Volvo dealer, but instead bought Freightliner trucks. *Id.* at 1272.

Thus, *all* of the incidents of alleged discrimination had one or both of two characteristics. First, in the sales-to-sales and offers-to-sales comparisons, Reeder did not compete against another Volvo dealer for the sale. For that reason, the alleged discrimination did not cause, and could not have caused, a diversion of sales or profits to a favored purchaser in any of these comparisons. Second, in the head-to-head and offers-to-sales comparisons, Reeder never purchased trucks from Volvo.

Reeder also produced evidence that Volvo adopted a business strategy, the "Volvo Vision," that included plans to reduce the number of Volvo dealers and to increase the average size of the regions that its dealers served. Reeder contended that Volvo limited the discounts it offered to Reeder in order to eliminate Reeder as a dealer. App., *infra*, 3a.

The jury returned a verdict for Reeder on its RPA claim. It found that Reeder suffered actual damages of $1,358,000, and those damages were automatically trebled to $4,074,000. App., *infra*, 33a, 38a. Volvo moved for judgment as a matter of law, which the district court denied. *Id.* at 35a.

C. The Court of Appeals' Decision

A divided panel of the Eighth Circuit affirmed the judgment for Reeder. The majority opinion described the evidence of the offers-to-sales, sales-to-sales, and head-to-head comparisons, as well as the evidence of Volvo's strategy to reduce the number of dealers through which it would sell its trucks, then turned to the requisite elements of secondary-line RPA violations.

The majority indicated that "as a threshold matter Reeder had to show it was a 'purchaser' within the meaning of the RPA." App., *infra*, 8a. The majority also recognized that Reeder was required to show that it competed with favored Volvo dealers, a requirement the majority described as only a showing that "'the favored and disfavored purchasers competed at the same functional level, i.e., all wholesalers or all retailers, and within the same geographic market.'" App., *infra*, 11a (quoting *Best Brands Beverage, Inc.* v. *Falstaff Brewing Corp.*, 842 F.2d 578, 585 (2d Cir. 1987)). The majority indicated that the RPA required proof of competitive injury, which it described by quoting in part the language of the statute: "The RPA prohibits price discrimination 'where the effect of such discrimination may be substantially to lessen competition * * * or to injure, destroy, or prevent competition.'" App., *infra*, 14a (quoting 15 U.S.C. § 13(a)). The majority's quotation omitted the key phrase that follows the quoted language: "with any person who knowingly grants or receives the benefit of such discrimination." 15 U.S.C. § 13(a).

When it analyzed these essential elements of an RPA claim, however, the majority addressed each in isolation from the

others. It concluded that Reeder was a "purchaser" because, in the four sales-to-sales comparisons, it actually purchased trucks from Volvo. App., *infra*, 10a. In those comparisons, though, there was no competition between Reeder and another Volvo dealer. When the majority considered whether Reeder was in actual competition with favored purchasers, it relied on the two head-to-head comparisons (*id.* at 11a-12a), but in those comparisons it was clear that there was no "purchase" by Reeder. The majority also stated that Reeder competed against favored Volvo dealers on the basis of evidence that Reeder and other dealers competed (or could compete) in the same geographic area (*ibid.*), even though there was no evidence (other than the two head-to-head comparisons that failed to result in Reeder purchases) that Reeder and the other dealers competed *for the same customers* or that there had been *discrimination* by Volvo in connection with any other head-to-head bids.

The majority held that the evidence was sufficient to show competitive injury, which it described as "lost profits and sales to Reeder and other dealers, and that favored competitors received substantial price reductions over a substantial period of time." App., *infra*, 15a. As examples, it pointed to one of the head-to-head comparisons (Reeder's unsuccessful Hiland Dairy bid) and one of the sales-to-sales comparisons. *Id.* at 16a. The majority also relied on the evidence of Volvo's plans to reduce the number of dealers, stating that "the jury properly could infer [that] Volvo's intent to reduce the number of its dealers manifested itself in the discriminatory concession practices." *Ibid.*

Judge Hansen dissented, describing the majority's opinion as an "attempt to fit a square peg into a round hole." App., *infra*, 27a. He observed that the market for heavy truck sales

> will never produce the kind of competition the RPA was designed to protect because it will never result in the type of two-purchase transaction that itself creates a market for the goods that are sold. Indeed, where, at the time of the

> end purchase, only one possible seller and one possible buyer exist, competition is totally absent. It is the nature of competitive bidding, not price discrimination, that makes it so.

Id. at 27a-28a. Judge Hansen noted that "'purchaser status' is inextricably intertwined with the existence of actual competition and the potential threat thereto." *Id.* at 28a. In the heavy truck market, "although Reeder and other 'favored' dealers may have competed generally with each other in the larger market for obtaining bids, there is evidence of only two occasions where Reeder competed with a 'favored' Volvo dealer for an actual sale." *Id.* at 29a. The sales-to-sales comparisons were irrelevant "because there was no actual competition between the two dealers at the time of the sales to the separate and different end users." *Ibid.* Judge Hansen also noted that RPA liability properly can be imposed "only where the factors necessary to state an RPA claim all are present in the same relevant transaction. To the extent that the court looks for the existence of one factor in one transaction and the existence of another factor in a second transaction, I conclude that the proof * * * is too tenuous." *Id.* at 30a. The absence of any evidence that sales or profits were diverted from Reeder to favored dealers was also a critical deficiency in Judge Hansen's view. "Although Volvo's conduct may have injured Reeder's ability to compete with non-Volvo dealers, Reeder must look outside the RPA for any relief for this claimed injury. Contrary to the court's assertion, such an injury is not the type of injury to competition that the RPA was intended to prevent." *Id.* at 29a-30a.

Volvo's petition for rehearing *en banc* was denied. Judges Gruender and Hansen dissented. App., *infra*, 43a-44a.

REASONS FOR GRANTING THE PETITION

This is the rare antitrust case that can be resolved simply by following the plain statutory language. In the two head-to-head

comparisons, Volvo did not "discriminate in price between different *purchasers* of commodities" (15 U.S.C. § 13(a) (emphasis added)), because Reeder did not purchase from Volvo in any of those transactions. In the sales-to-sales comparisons, Reeder competed only against dealers that bought trucks from suppliers *other than* Volvo, so there was no harm to "competition with any person who * * * knowingly *receives the benefit of* * * * *discrimination*" by the defendant. *Ibid.* (emphasis added). And, in the offers-to-sales comparisons, Reeder did not purchase from Volvo *or* compete against another Volvo dealer. That should have been the end of this case. Decision after decision from other courts of appeals – and from this Court – has followed the statutory language, and therefore conflicts with the decision below.

As Justice Scalia has observed, "sales of like goods in interstate commerce violate" Section 2(a) "if three conditions are met: (1) the seller discriminates in price between *purchasers*, (2) the effect of such discrimination may be to injure competition *between the victim and beneficiaries of the discrimination* or their customers, and (3) the discrimination is not cost based." *Texaco Inc.* v. *Hasbrouck*, 496 U.S. 543, 577 (1990) (opinion concurring in judgment) (emphasis added). There is simply no doubt here that the two head-to-head comparisons fail the first condition, the sales-to-sales comparisons fail the second, and the offers-to-sales comparisons fail both. The decision below conflicts with the entire relevant body of RPA jurisprudence and erases two bright-line rules on which antitrust lawyers have relied for decades to assure clients that certain forms of competitive discounting are permissible. See, *e.g.*, 3 EARL W. KINTNER & JOSEPH P. BAUER, FEDERAL ANTITRUST LAW §§ 21.12, 22.12 (1983) (discussing two-purchase and competitive-injury requirements); ABA SECTION OF ANTITRUST LAW, A PRIMER ON THE FEDERAL PRICE DISCRIMINATION LAWS 4, 8 (2000) (same).

I. The Eighth Circuit's Holding That A Discriminatory Offer Can Violate The RPA Is Incorrect And Conflicts With Decisions In Other Circuits That The RPA Prohibits Only Discrimination Between "Purchasers"

The Eighth Circuit's decision is plainly incorrect – and squarely conflicts with decisions in other circuits – to the extent that it rests on alleged discrimination by Volvo in the prices that it *offered* to Reeder in the two head-to-head comparisons and in the offers-to-sales comparisons. The RPA makes it unlawful to discriminate in price "between different *purchasers*." 15 U.S.C. § 13(a) (emphasis added). That language uniformly has been understood to require proof of at least two consummated purchases at different prices. Discriminatory offers do not violate the RPA.

The "two-purchase" rule is such a fundamental aspect of RPA jurisprudence that it is often treated as "jurisdictional." See, *e.g.*, *Terry's Floor Fashions, Inc.* v. *Burlington Indus., Inc.*, 763 F.2d 604, 615 (4th Cir. 1985). The rule has been applied strictly and literally to preclude RPA liability for discrimination in a wide range of transactions that do not result in two or more "purchases" at different prices. Courts have held, under this rule, that the RPA does not prohibit price discrimination in leases, licenses, product exchange transactions, or consignment arrangements. See, *e.g.*, *Seaboard Supply Co.* v. *Congoleum Corp.*, 770 F.2d 367, 373 (3d Cir. 1985) (consignments); *Export Liquor Sales, Inc.* v. *Ammex Warehouse Co.*, 426 F.2d 251, 252 (6th Cir. 1970) (leases), cert. denied, 400 U.S. 1000 (1971); *LaSalle Street Press, Inc.* v. *McCormick & Henderson*, 293 F. Supp. 1004, 1005 (N.D. Ill. 1968) (patent license agreement), aff'd, 445 F.2d 84 (7th Cir. 1971). See also 14 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2313b, at 20-23 (1999) ("By contrast [to the Sherman Act], the Robinson-Patman Act speaks only of 'purchasers' * * *."). The RPA does not prohibit outright refusals to sell at any price to a prospective

buyer, because a refusal to sell does not lead to a purchase. See *Black Gold, Ltd.* v. *Rockwool Indus., Inc.*, 729 F.2d 676, 682-683 (10th Cir.), cert. denied, 465 U.S. 854 (1984); *Shaw's, Inc. v. Wilson-Jones Co.*, 105 F.2d 331, 333-334 (3d Cir. 1939). See also 14 HOVENKAMP, *supra*, ¶ 2312c, at 24. And the Fourth and Fifth Circuits have held that the two-purchase requirement precludes RPA liability in precisely the situation presented in this case: where the defendant allegedly extended discriminatory offers to offerees that were bidding against one another, and where two purchases did not occur because the losing bidder-offeree never completed a purchase.

1. In *Terry's Floor Fashions*, the defendant offered to sell at list price to the plaintiff and at a discount from list price to one of plaintiff's competitors. Both the plaintiff and its competitor submitted bids to a retail customer, but there was only one purchase from the defendant arising from those bids. The Fourth Circuit affirmed the dismissal of the RPA claim because the plaintiff "had not shown, or even alleged, two comparable, completed sales and had therefore not satisfied one of the jurisdictional prerequisites for establishing a violation of Section 2(a) of Robinson-Patman." 763 F.2d at 615.

The Fifth Circuit in *M.C. Manufacturing Co.* v. *Texas Foundries, Inc.*, 517 F.2d 1059 (5th Cir. 1975), cert. denied, 424 U.S. 968 (1976), reversed a judgment for the plaintiff where the defendant had offered to sell at different prices to plaintiff and one of its competitors, in connection with their competing bids for a government contract. The plaintiff and the favored offeree "were competitive *bidders* on the * * * contract." *Id.* at 1067 (emphasis in original). Even though their bids were in competition, "[t]hese bids alone cannot form the basis for a Robinson-Patman Act claim since they do not satisfy the two-purchaser requirement." *Id.* at 1067 n.17.

These holdings cannot be distinguished from the decision in this case on the basis of Reeder's "status" as a purchaser.

The plaintiffs in *Terry's Floor Fashions* and in *M.C. Manufacturing Co.* purchased from the defendants in *other transactions*. *Terry's Floor Fashions*, 763 F.2d at 615; *M.C. Mfg. Co.*, 517 F.2d at 1067; see also *Shaw's*, 105 F.2d at 333. Therefore, each of those plaintiffs had the same "status" as a "purchaser" that Reeder had here. The Fourth and Fifth Circuits recognized, though, that the two-purchaser requirement must be satisfied in the specific transaction on which RPA liability is predicated, while the Eighth Circuit ignored that requirement.

2. The two-purchaser rule reflects an important choice Congress made when it drafted the RPA. Congress did not enact an open-ended authorization for courts to protect the business opportunities of prospective buyers. It sought to address a specific set of circumstances: the perceived buying power of chain stores that were emerging to compete against single-store rivals in the 1930s. A prohibition against discrimination between "purchasers" addressed that specific problem (though the interpretation and enforcement of that prohibition also produced widely recognized practical problems and to some degree undermined the basic policies reflected in other provisions of the antitrust laws). Extension of the RPA beyond its express terms, to address forms of price discrimination unlike the paradigmatic practices that led to its enactment, would add to the costs associated with the statute even though Congress has never identified these other forms of price discrimination as a "problem" that needed to be addressed.

The two-purchaser rule therefore serves the important function of restricting the RPA's reach – and limiting the costs associated with its prohibitions – to the specific practices with which Congress was concerned. There is no reason to suppose that Congress intended to prohibit discrimination in the price of services (as opposed to "commodities") or discrimination in the terms of leases, licenses, consignments, and other commercial transactions that do not result in the purchase of a commodity.

Similarly, there is no indication that the statute was meant to address discriminatory refusals to deal or, as in this case, discriminatory offers to sell. Any attempt comprehensively to regulate the myriad forms of commercial "discrimination" would entail enormous complication and cost. Nothing in the RPA suggests that Congress wanted to go down that road.

The requirement of discrimination between "purchasers" can be also be viewed as a congressional decision not to prohibit "attempts." As Professor Hovenkamp explains:

> An unaccepted or uncompleted offer occurs when the seller is willing to quote a price, howbeit a higher price than the seller is charging to other buyers, but the plaintiff fails to purchase the product. Clearly, an unaccepted or uncompleted offer is not a sale; nor is a price quotation that is not followed by a purchase, even if the result of the higher quote is that the plaintiff loses a bid. This is simply another way of saying that there is no "attempt" offense built into the Robinson-Patman Act. If one attempts to violate the statute by offering a prospective purchaser a higher or lower price, but no transaction occurs, the statute simply has not been violated.

14 HOVENKAMP, *supra*, ¶ 2300, at 27 (footnotes omitted). The Eighth Circuit wholly failed to understand this basic principle of RPA law.

II. The Eighth Circuit's Decision Conflicts With Decisions Of Other Circuits That Permit RPA Liability Only If The Discrimination Is Likely To Divert Sales Or Profits From Disfavored Purchasers To Favored Purchasers

As the RPA's words make clear, it protects competition "with any person who * * * knowingly receives the benefit of such discrimination" (15 U.S.C. § 13(a)), *i.e.*, of discrimination

in price "between different purchasers."[3] The Eighth Circuit ignored this limitation by imposing liability for discrimination in transactions in which Reeder did not compete against a favored purchaser, but competed only against non-Volvo dealers.

This radical extension of the RPA – construing the Act to protect disfavored purchasers' ability to compete against *any* firm in the market, not just against the favored purchasers specifically mentioned in the statute – effectively transforms price discrimination into a *per se* violation of the antitrust laws,

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[3] In "secondary-line" cases involving effects on customers of the defendant-seller, courts of appeals have long been divided on whether the RPA requires proof of anticompetitive effects similar to the effects required by other antitrust provisions. The D.C. Circuit, in *Boise Cascade Corp.* v. *FTC*, 837 F.2d 1127 (D.C. Cir. 1988), emphasized the need to avoid unnecessary inconsistencies between the RPA and other antitrust statutes that are construed to promote "pro-competitive efficiency and maximization of consumer welfare." *Id.* at 1138. Therefore, the D.C. Circuit held that injury to *competition* is required. *Id.* at 1143. The Ninth Circuit has explicitly disagreed with *Boise Cascade*, holding that "the inference of competitive injury that arises from proof of injury to a competitor may not be rebutted by evidence that competition was not adversely affected." *Chroma Lighting* v. *GTE Prods. Corp.*, 111 F.3d 653, 655 (9th Cir.), cert. denied, 522 U.S. 943 (1997). The Third Circuit has reached the same conclusion (*J.F. Feeser, Inc.* v. *Serv-A-Portion, Inc.*, 909 F.2d 1524 (3d Cir. 1990), cert. denied, 499 U.S. 921 (1991)), and the Eighth Circuit is aligned with the Third and Ninth Circuits. *Richard Short Oil, Inc.* v. *Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986). In the Eighth Circuit, the requisite effect on "competition" may be established if price discrimination may "substantially lessen the ability of unfavored buyers to continue to compete." *Ibid.*; see also *Rose Confections, Inc.* v. *Ambrosia Chocolate Co.*, 816 F.2d 381, 386 n.3 (8th Cir. 1987) (requisite harm to "competition" is shown if plaintiff and other similarly situated purchasers lost sales or profits because of discrimination). Although the Eighth Circuit's view of what constitutes harm to "competition" under the RPA presents a broad conflict with the D.C. Circuit that is implicated by this case, and could be resolved through a grant of certiorari in this case, the Eighth Circuit's decision is plainly wrong – and in conflict with the decisions of other circuits – under *any* conception of competition, including mere harm to a competitor, because the other statutory requirements are not met.

in contravention of this Court's observation that "the statute as a practical matter could not, and does not, ban all price differences." *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993). As the leading treatise explains (14 HOVENKAMP, *supra*, ¶¶ 2333a-2333b, at 88-89):

> The theory of secondary-line Robinson-Patman injury is that the unlawful price discrimination injures the disfavored purchaser[] in its ability to compete with the favored purchaser. * * * [T]he mere payment of a higher price than someone else pays for something is insufficient to support the injury requirement. The disfavored purchaser must be injured in its ability to compete with the favored purchaser. For example, suppose that General Motors sells automobiles to a small dealer in Decatur, Michigan, at a higher price than it does to a large dealer in Atlanta, Georgia. But the two dealers each operate in their own geographic areas and never compete for sales to the same customers. We can certainly say that the Decatur dealer has suffered an injury in the sense that it would be better off if it could purchase cars more cheaply, paying the same price that the Atlanta dealer pays. But this is not the injury that the Robinson-Patman Act contemplates. The injury is not merely in the higher purchase price that would injure any purchaser of an input, but in the loss of ability to compete effectively with the favored purchaser. A plethora of decisions have asserted this basic proposition.

This basic proposition is reflected in two complementary principles of RPA jurisprudence. First, other circuits have held that a disfavored purchaser-plaintiff must prove that it competes against favored purchasers because such competition is an essential predicate for the kind of competitive injury – diversion of sales or profits from disfavored to favored purchasers – that is required for a secondary-line RPA violation. Second, other circuits have held that disfavored purchaser-plaintiffs cannot

recover damages unless they show that the discrimination diverted sales or profits from disfavored to favored purchasers.

1. Decisions in the Second and Fifth Circuits have squarely held that plaintiffs in secondary-line RPA cases must prove that there is competition between favored and disfavored purchasers, such that the discrimination may cause the diversion of sales or profits to favored purchasers. The decision below conflicts with those holdings.[4]

In *Best Brands Beverage*, 842 F.2d 578, the Second Circuit reversed a judgment in favor of a disfavored purchaser. Observing that "price discrimination (or pricing on a non-equal basis) standing alone is not illegal per se," the Second Circuit held that plaintiffs must also prove "the likelihood of competitive injury resulting from the alleged discrimination." *Id.* at 584. This competitive injury is dependent on proof that the disfavored purchaser "was engaged in actual competition with the favored purchaser(s)." This "competitive nexus" is

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[4] This Court's decisions plainly assume – even if they do not hold – that competition that could lead to a diversion of sales or profits from disfavored purchasers to favored purchases is a *sine qua non* of secondary-line RPA liability. For example, *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), held that an inference of competitive injury may be drawn from evidence that producers "sell their goods to some customers substantially cheaper than they sell like goods *to the competitors of these customers*." *Id.* at 50 (emphasis added). *Falls City Indus., Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983), observed that actionable RPA injury "is not limited to the injury to competition between the favored and the disfavored purchaser; it also encompasses the injury to competition between their customers." *Id.* at 436. See also *Texaco Inc.* v. *Hasbrouck*, 496 U.S. at 570 ("to the extent that" favored purchasers competed against plaintiffs, *Morton Salt* presumption of competitive effect was appropriate); *id.* at 571-572 (evidence of diversion of customers to favored purchaser); *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 569-570 (1981) (Powell, J., dissenting) (to recover damages RPA plaintiff must show that unlawful discrimination "allowed a favored competitor to draw sales or profits from him, the unfavored competitor").

required because, "[i]n a secondary-line case, plaintiff must show that the probable effect of the discrimination would be to allow the 'favored competitor to draw sales or profits from him, the unfavored competitor.'" *Id.* at 584-585 (quoting *J. Truett Payne Co.*, 451 U.S. at 569-570 (Powell, J., dissenting in part)).

In *Best Brands Beverage*, the disfavored purchaser and the favored purchaser operated in adjacent geographic areas. The plaintiff produced evidence that transshipping between adjacent areas with different prices was "a pervasive practice," but such evidence was held insufficient to support RPA liability because there was no evidence that transshipping occurred in response to the *specific* price differentials that the plaintiff invoked as a basis of liability, and because the plaintiff did not demonstrate the impact of any transshipping on inter-territory competition. *Id.* at 586. This was a fatal defect, according to the Second Circuit, because competition between "Best [the disfavored purchaser] and Southland [the favored purchaser]" was an "essential element of a price discrimination claim." *Ibid.*

The Fifth Circuit applied the same principle in *M.C. Manufacturing Co.*, 517 F.2d 1059, and in *Infusion Resources, Inc.* v. *Minimed, Inc.*, 351 F.3d 688 (5th Cir. 2003), cert. denied, 124 S. Ct. 2881 (2004). In *M.C. Manufacturing Co.*, the plaintiff contracted to sell a product to the government and paid 32.5 cents per unit to the defendant (a subcontractor) for an input needed to make the product. 517 F.2d at 1062. In connection with a subsequent government procurement, the defendant sold the same product (again as a subcontractor) for 31 cents to a different purchaser. *Ibid.* The Fifth Circuit held that this price difference did not violate the RPA because the lower price could not have diverted sales to the favored purchaser.

> It is the government's unavailability to [plaintiff] as a customer of any of the government's needs under the [second] contract, and its similar unavailability to [the favored purchaser] on the [first contract,] which prevents

> purchases made in performance on one from being in competition with those made under the other. Each contract represented a separate, distinct market open only to a single producer. Once it was awarded the bid * * * [plaintiff's contract] was assured to it to the exclusion of all other suppliers regardless of any discrepancy in prices paid on underlying subcontracts.

Id. at 1067. The plaintiff and the favored purchaser "were not competing for the same consumer dollar" in their activities under the two contracts. *Id.* at 1068.

In *Infusion Resources*, applying the principle that favored and disfavored purchasers must be competing "for the same dollar," the Fifth Circuit rejected an RPA claim because the plaintiff, though it competed with a favored purchaser, did not compete at the time of the price discrimination. 351 F.3d at 692-693.

2. A plaintiff seeking damages for a violation of the RPA must prove "actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne Co.*, 451 U.S. at 562. Plaintiffs must show "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which made the defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 484 (1977) (emphasis in original). The First and Third Circuits have held that, because of this antitrust injury requirement, damages cannot be recovered for a violation of the RPA without proof that the price discrimination harmed the plaintiff's ability to compete *against favored purchasers*. The Eighth Circuit's decision conflicts with those holdings.

In *Allen Pen Co.* v. *Springfield Photo Mount Co.*, 653 F.2d 17 (1st Cir. 1981), a directed verdict for the defendant was affirmed, in an opinion by then-Judge Breyer, even though the evidence was assumed to be sufficient to show that the defendant charged higher prices to the plaintiff than to its competitors. Such price differences were not enough to show actual injury caused by the price discrimination, the First Circuit held, because there was no indication that the price differences "could lead *the benefitted competitors* to lower their prices to the point where they could attract significant numbers of Allen Pen's customers or that Allen Pen's overall profitability could be significantly affected." *Id.* at 21 (emphasis added).

In *Stelwagon Manufacturing Co.* v. *Tarmac Roofing Systems, Inc.*, 63 F.3d 1267 (3d Cir. 1995), cert. denied, 516 U.S. 1172 (1996), the plaintiff proved the existence of substantial differences between the price it paid to the defendant and the price that favored purchasers paid, and also proved that its sales had declined during the period of the discrimination. *Id.* at 1272-1273. The Third Circuit nevertheless reversed a judgment for the plaintiff because there was no proof that the defendant's price discrimination had caused plaintiff to lose sales to favored purchasers. *Id.* at 1276. The district court had denied the defendant's motion for judgment as a matter of law, relying on hearsay testimony that some customers said they could and did buy from a favored purchaser, rather than from the plaintiff, because of its lower prices. *Id.* at 1274. The Third Circuit held that this hearsay testimony was inadmissible to prove the truth of the matter asserted and reversed a judgment for the plaintiff in the absence of any other evidence that the discrimination caused it to lose sales to a favored competitor. *Id.* at 1274-1276.

When a disfavored purchaser loses sales to a competitor that does not buy or sell the defendant's products, rather than to a favored purchaser, the lost sales cannot be said to flow from that which made the defendant's acts unlawful, *i.e.*, the *discrimination* in price. The discrimination could be eliminated by raising prices to the favored purchaser, leaving the unfavored purchaser in exactly the same position *vis-à-vis* the competitor

to which the sale was lost. The absolute level of the price charged to the plaintiff (compared to the price charged by an entirely different seller to the competitor that captured the sale) – *not* the defendant's discrimination – affects the plaintiff's competitive opportunities. As Judge Hansen's dissent explains, "Although it is possible that Reeder lost sales or profits to non-Volvo dealers because it did not receive a sufficiently high concession from Volvo * * *, the *difference* in concessions offered to Reeder and the 'favored' Volvo dealers did not cause the lost sales or profits on those deals." App., *infra*, 31a (emphasis in original). See also *M.C. Mfg. Co.*, 517 F.2d at 1065 (no injury resulting from discriminatory pricing when – even without the complained-of pricing conduct – sale would have been lost to a competitor other than the favored purchaser).

3. In this case, the majority below recognized that Reeder was required to show that it competed against favored Volvo dealers, but failed to comprehend the reason for that requirement: to show that the discrimination could cause the diversion of sales or profits to favored purchasers. The majority concluded that Volvo could be liable for discrimination in the sales-to-sales and offers-to-sales comparisons – where there was no competition between Reeder and other Volvo dealers, and therefore no possibility that sales or profits could be diverted from Reeder to a favored purchaser – because Reeder competed against other Volvo dealers for *other* sales. The court divorced the question whether Reeder competed with favored purchasers from the question whether the discrimination affected that competition, treating the former as a question about Reeder's status, unrelated either to the requisite competitive effect or to the causal link between the discrimination and that effect.

Judge Hansen's dissent recognized this point. "Reeder's attempt to compare a sale that it made to one end user to a sale made by a 'favored' Volvo dealer to another end user with whom Reeder had no relationship simply is not relevant to

proving a violation of the RPA because there was no actual competition between the two dealers at the time of the sales to the separate and different end users." App., *infra*, 29a. Evidence that Reeder and favored dealers "competed generally with each other" is insufficient because "where alleged lost sales or profits were not diverted from Reeder to 'favored' Volvo dealers, but rather to other non-Volvo dealers, it is unclear how any difference in price offered by Volvo to its two dealers could possibly injure actual competition between them." *Ibid.* An RPA violation could be shown only "where the factors necessary to state an RPA claim all are present in the same relevant transaction." *Id.* at 30a; accord *Hasbrouck*, 496 U.S. at 556; *id.* at 577 (Scalia, J., concurring in the judgment).

The conflict between the majority's decision in this case and the decisions in *Best Brands Beverage*, *M.C. Manufacturing Co.*, *Allen Pen*, and *Stelwagon Manufacturing Co.* cannot be reconciled by the observation that Reeder competed to some degree against favored purchasers. There was similar evidence of competition between the plaintiffs and favored purchasers in *Best Brands Beverage*, *M.C. Manufacturing Co.*, *Allen Pen*, and *Stelwagon Manufacturing Co.*, but in those decisions the critical issue was understood correctly to be whether the discrimination could cause diversion of sales or profits from the disfavored to the favored purchaser. That issue cannot be resolved merely by asking whether the plaintiff and favored purchasers compete with one another; courts also must ask whether and how the alleged *discrimination* could *affect* that competition. The other circuits correctly understood that, if the discrimination does not affect the plaintiff's ability to compete against favored purchasers, there can be no violation of the RPA. The Eighth Circuit missed the point.

4. The Eighth Circuit believed that evidence of Volvo's business strategy to reduce the number of Volvo dealers sup-

ported an inference of the requisite competitive injury. That belief is plainly incorrect.

The antitrust laws have long recognized that a manufacturer may limit the number of firms that distribute its products. A manufacturer's outright refusal to deal with a potential distributor is permissible, except in the most extraordinary circumstances. See *Verizon Comm'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 878 (2004). The RPA prohibits certain forms of price discrimination between different purchasers, but places no restraints on a manufacturer's freedom to choose the number, the identity, the location, or the characteristics of distributors to which it will sell or on a manufacturer's freedom to terminate any distributor at will. The majority based its decision on a belief that "the elimination of some dealers like Reeder * * * is precisely the type of injury the antitrust laws were meant to prevent." App., *infra*, 19a (citing *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969)). That belief was clearly wrong. See also, *e.g.*, *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717 (1988) (upholding termination of price-cutting dealer in the absence of an express or implied agreement with another dealer on price).

Nor does Volvo's business strategy shed any light on its motive or intent that supports an inference of competitive injury. As a preliminary matter, there is no reason Volvo would want to divert sales from Reeder to non-Volvo dealers. See Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, in *Symposium: Antitrust at the Millennium*, 68 ANTITRUST L.J. 125, 126 (2000) ("[A] manufacturer cannot profit by weakening its own distribution system or reducing that system's competitiveness.").

More important, as a matter of law, the question whether Volvo discriminated, let alone the question of why it discriminated, has no bearing on the *effect* of the discrimination. Even on the dubious assumption that a desire to eliminate Reeder as

a Volvo dealer provided a motive for discrimination, Reeder was still required to show that the discrimination impaired its ability to compete against a favored purchaser. That essential element of any RPA violation requires proof that the discrimination occurred where there is a competitive relationship between Reeder and the favored dealers. In the absence of any such relationship, Volvo's practices cannot produce the requisite competitive effects, regardless of motive or intent. For that reason, Reeder's sales-to-sales and offers-to-sales comparisons are insufficient, as a matter of law, to support RPA liability.

III. The Eighth Circuit's Decision To Extend The RPA Will Be Harmful To Competition, Even Outside Of The Eighth Circuit

The decision below will be harmful to competition and consumers, and those effects will extend well beyond the boundaries of the Eighth Circuit.

1. Courts have a duty to be faithful to congressional intent when interpreting the RPA and "are not free to consider whether or how the statute should be rewritten." *Texaco Inc.* v. *Hasbrouck*, 496 U.S. at 568 n.27. Such restraint is especially important when interpreting the RPA because interpretations that "extend beyond the prohibitions of the Act * * * give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Great Atl. & Pac. Tea Co.* v. *FTC*, 440 U.S. 69, 80 (1979) (quoting *Automatic Canteen Co. of America* v. *FTC*, 346 U.S. 61, 63 (1953)). Congress drafted the RPA to forbid only certain kinds of price discrimination. "[T]he statute as a practical matter could not, and does not, ban all price differences." *Brooke Group*, 509 U.S. at 220.

2. By extending the RPA to permit recovery for sales lost to any competitor, not just sales lost to a favored purchaser, the decision creates a serious risk of treble-damage liability for any seller that charges different prices to different customers, even

if those differences occur over time and in disparate geographic areas. Under a correct reading of the RPA, manufacturers can adjust their prices to reflect the changes in costs, demand, and competitive conditions, so long as they ensure that those price differences do not tilt the playing field on which their purchasers compete against each other. This is a workable standard because manufacturers have some power to predict whether price differences will lead to a substantial diversion of sales or profits from disfavored to favored dealers. The antitrust laws also permit manufacturers to control the risk of such diversion to a considerable degree, for example, by limiting the geographic areas or the categories of customers that individual dealers will be permitted to serve. The RPA imposes real constraints but does not completely eliminate pricing flexibility.

If RPA liability can arise when sales or profits are diverted to *any* firm that competes against a purchaser, as the Eighth Circuit permits, this flexibility will be greatly reduced. Manufacturers will incur substantial risks of treble-damage liability from *any* price difference. Every distributor of a manufacturer's products will be able to show that it could compete more successfully in the market – that it could sell more units or earn higher profits – if it could pay less when purchasing the products it resells. Whenever a manufacturer charges different prices to different customers, customers who pay the higher price will be able to show this phantom RPA injury.

That risk can arise under the Eighth Circuit's decision even if a manufacturer takes care – as Volvo does – to charge uniform prices to all distributors *within* a market, if the manufacturer nonetheless charges different prices in one market than in another. That is because a distributor operating in both markets will be able to demonstrate its "status" as a competitor to other purchasers in the lower-price market, and demonstrate lost sales or profits to other competitors (who do not purchase from the discriminating manufacturer) in the high-price market.

Perversely, the risk that a manufacturer will incur this newly created liability is greatest in precisely those markets where there is little, if any, risk of a true RPA injury, *i.e.*, in markets where inter-brand competition is intense and intra-brand competition has little competitive significance. In such markets, inter-brand competition drives prices towards costs, and price differences are likely to be based on differences in costs. When facing intense inter-brand competition, an individual manufacturer has no market power, and any attempt to charge an unreasonably high price to a distributor would be contrary to the manufacturer's own interests.[5] See Hovenkamp, *The Robinson-Patman Act*, *supra*, 68 ANTITRUST L.J. at 127 ("[T]he manufacturer cannot profit by making its distribution system more costly, by restricting the volume of product it is capable of handling, or by reducing its competitiveness against the products of other manufacturers."). It is in such markets, more than any others, that a manufacturer's price differences are least likely to produce the kinds of intra-brand effects the RPA was meant to address, but most likely to coincide with lost sales or profits to inter-brand competitors, the kind of "injury" that was the basis of liability in this case.

The decision below inevitably will push manufacturers toward greater price uniformity and rigidity. It is doubtful that this result will benefit any distributor in the long run; it is *certain* that it will be harmful to consumers. See Hovenkamp, *The Robinson-Patman Act*, *supra*, 68 ANTITRUST L.J. at 127 ("[W]henever anyone takes a longer view than the shortest one possible, incentive discounts further, rather than injure, competition."). Economists and antitrust scholars have achieved a

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[5] No doubt can exist in this case that Volvo does face intense competition from other brands of heavy trucks, and lacks market power in the antitrust sense. Volvo is one of many truck manufacturers and has only a ten percent share of sales. See http://www.todaystrucking.com/trucksales-us.cfm. Reeder made no claim to the contrary.

broad and durable consensus that generalized constraints on pricing flexibility are harmful to the competitive process and to the interests of consumers, regardless of their effects on the commercial interests of individual competitors. "[P]rices may be made more fluid and the general price level in the market *lowered* if the suppliers can vigorously pursue selected buyers with discounts and if major purchasers can use their countervailing power to force producers to grant price concessions." 1 ABA SECTION OF ANTITRUST LAW, THE ROBINSON-PATMAN ACT: POLICY AND LAW 29 (Paul H. LaRue, et al. eds. 1980) (emphasis added) (citing U.S. Dep't of Justice, *Report on the Robinson-Patman Act* 63-64 (1976)). Judge Bork has noted that "adjustment to shifting costs and demand is socially desirable, and it is best that appropriate responses be made as quickly as possible." ROBERT H. BORK, THE ANTITRUST PARADOX 388 (1978). "[R]igid" prices and markets that are "less sensitive to changing demands and costs" are an unhappy result of precluding sellers from "rais[ing] or lower[ing] prices selectively." *Ibid.* See also *id.* at 389-390 (describing pricing flexibility as a protection against cartel behavior). Professor Hovenkamp's treatise summarizes the "voluminous literature" on the means by which price-discrimination laws, if wrongly construed, can "facilitate price rigidity, including oligopoly and collusion." 14 HOVENKAMP, *supra*, ¶ 2340b1, at 121-123.[6]

The Solicitor General, the Antitrust Division, and the Federal Trade Commission have correctly read this Court's precedents to require interpreting the RPA "in a manner that is consistent with the procompetition policies expressed in the antitrust laws." Merits Br. for the United States and Federal

[6] Consistent with the intense competition among manufacturers (see n.5, *supra*), testimony at trial indicated Volvo's need to "adjust its prices to meet competition." "It's a fluid situation * * *. It varies a lot, and not having the ability to adjust to that, I just don't foresee us getting very many deals." C.A. ER 1622 (testimony of Volvo Sales Manager Michael P. Truta).

Trade Commission at 17, *Texaco Inc.* v. *Hasbrouck*, No. 87-2048, available at http://www.usdoj.gov/osg/briefs/1989/sg890525.txt. "[T]he Court has sought to reduce the friction between the [Robinson-Patman and Sherman Acts] by declining to expand the coverage of the Robinson-Patman Act in ways that would 'help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation.'" *Id.* at 18 (quoting *Automatic Canteen Co.*, 346 U.S. at 63).

3. Damage actions for RPA violations may be filed under Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a), in any district in which the defendant resides, is found, or has an agent. Under this liberal standard, every manufacturer that distributes its products nationally, or in any smaller region that includes a district within the Eighth Circuit, is subject to lawsuits that will be decided under the Eighth Circuit's erroneous interpretation.

The problem is not just that other defendants may be held liable for behavior that is legal. Far worse, manufacturers will change their pricing policies – by refusing to discount – to avoid the threat of treble-damage liability. All prudent manufacturers seek and follow legal advice to avoid RPA risks. See Joseph, *supra*, ANTITRUST, Summer 2003, at 3 (noting an extraordinary level of interest in publications and seminars devoted to RPA counseling). Faced with the Eighth Circuit's decision, lawyers properly will advise their clients that any price differences now entail serious risks of treble-damage litigation.

Manufacturers cannot avoid this risk merely by charging uniform prices within the Eighth Circuit. Even if they do so, they will still risk RPA liability if their prices within the Eighth Circuit differ from their prices elsewhere, so long as a potential plaintiff can demonstrate its "status" as a competitor to another purchaser, wherever located, that received a price that was different from the price charged in the Eighth Circuit. One predictable result will be less vigorous price competition between

sellers who operate in the Eighth Circuit, even when they are competing elsewhere. See 14 HOVENKAMP, *supra*, ¶ 2340b1. Another result will be to distort competition outside of the Eighth Circuit if one seller operates within the Eighth Circuit, and must adopt uniform pricing or risk RPA liability, while competing against a seller that does not operate in the Eighth Circuit, and thus is free to price flexibly in response to localized competitive conditions.

The RPA is "a statute regarded by many as the antitrust laws' illegitimate child" because it "often operates in ways that are inimical to the goals of the antitrust laws generally." 14 HOVENKAMP, *supra*, ¶ 2300, at 3 & n.1. To the extent that it is the Act itself – not judicial misinterpretation of it – that runs counter to sound antitrust policy, arguments for reform must be addressed to Congress. But cf. *Brooke Group*, 509 U.S. at 220 (quoting *Great Atl. & Pac. Tea Co.*, 440 U.S. at 80 n.13) ("'[T]he Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws.'"). Where, as here, however, the Act has been interpreted in an anticompetitive manner only because a court *failed* to heed the intent of Congress as expressed in plain words – words other courts of appeals have understood well – it is this Court, not Congress, that can and should resolve the circuit split, correct the error, and prevent the widespread harm that the judicial error portends.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAVID L. WILLIAMS
MICHAEL N. SHANNON
Rose Law Firm
A Professional Association
120 East Fourth Street
Little Rock, Arkansas 72201
(501) 375-9131

ROY T. ENGLERT, JR.*
DONALD J. RUSSELL
MAX HUFFMAN
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

**Counsel of Record*

JANUARY 2005

APPENDIX

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 02-2462

Reeder-Simco GMC, Inc.,	*	
	*	
Appellee,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	Western District of Arkansas.
Volvo GM Heavy Truck	*	
Corporation, now known as	*	
Volvo Trucks North	*	
America, Inc.,	*	
	*	
Appellant.	*	

Submitted: April 15, 2003

Filed: July 12, 2004

Before BYE, RICHARD S. ARNOLD, and HANSEN, Circuit Judges.

BYE, Circuit Judge.

Volvo Trucks North America, Inc. (Volvo) appeals from a judgment entered in the district court[1] in favor of Reeder-Simco GMC, Inc. (Reeder) on claims alleging unfair price discrimination under the Robinson-Patman Act (RPA), 15 U.S.C. § 13, and a failure to deal in good faith and in a commercially reasonable manner under the Arkansas Franchise Practices Act (AFPA), Ark. Code Ann. §§ 4-72-201 through 4-72-209. We affirm.

I

This is an appeal from the denial of a motion for judgment as a matter of law (JAML) following a jury verdict; consequently we recite the evidence in the light most favorable to the verdict holder, Reeder. See Jones v. Swanson, 341 F.3d 723, 731 (8th Cir. 2003).

Reeder sells new and used trucks, including heavy-duty trucks, out of a dealership located in Fort Smith, Arkansas. Volvo manufactures a broad line of heavy-duty trucks for both over-the-road and vocational use (dump trucks, mixer trucks, etc.) In 1995, Reeder signed a franchise agreement with Volvo to become an authorized Volvo truck dealer for a five-year term expiring March 31, 2000. The agreement provided for automatic one-year extensions of the franchise if Reeder met certain sales objectives established unilaterally by Volvo.

The majority of heavy-duty trucks sold by dealers are manufactured only after a retail customer has solicited and accepted bids from several dealers. During this competitive bidding process, dealers seek concessions from Volvo for a price below the initial wholesale price (80% of the published retail price) which then allows the dealers to offer lower prices to their customers. This is an industry-wide practice. To

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[1] The Honorable Robert T. Dawson, United States District Court for the Western District of Arkansas.

remain competitive with other truck manufacturers, Volvo does not reveal its method of calculating concessions. The crux of this case is Reeder's claim that Volvo gave other dealers more favorable price concessions than Volvo granted Reeder, which concomitantly reduced Reeder's profits on successful bids and increased the number of Reeder's unsuccessful bids.

Reeder filed this action in February 2000 alleging Volvo violated the RPA and AFPA and tortiously interfered with Reeders' contracts. The RPA claim alleged both primary-line and secondary-line violations (explained below). The district court granted Volvo's motion for summary judgment on the alleged primary-line RPA violation and claim for tortious interference. The remaining claims – the secondary-line RPA and AFPA claims – were tried to a jury.

Reeder presented the following evidence at trial. In December 1997, Volvo announced the "Volvo Vision" in an email distributed to its dealers, including Reeder. The email had a list of Volvo's challenges, which included "too many dealers" and "under performing dealers." App. 576. The Volvo Vision called for "fewer dealers, larger markets." Id. The email further indicated Volvo wanted to more than double the average market size of its dealers and decrease the number of dealer owners from 146 to 75.

In March 1998, Volvo held its annual North American Dealer Conference in Marco Island, Florida. Marc Gustavson, a Volvo executive, was the conference's keynote speaker. He elaborated on the Volvo Vision by indicating 50% of current Volvo truck dealers would not be in business in the next few years. Unlike Volvo's past annual dealer conferences, where Volvo featured motivational speakers who got dealers "revved up" to sell more trucks, id. at 1119, the featured guest speaker of the 1998 conference was Jon Krakauer, author of "Into Thin Air: A Personal Account of the Mt. Everest Disaster." Krakauer spoke of falling short of his goal to reach the summit of Mt.

Everest and told the dealers sometimes they had to learn to give up without achieving their goals.

Prior to and during this same time frame (1996-1998), Reeder noticed an increase in the sales objectives Volvo expected of it, coupled with a decrease in the pricing concessions it obtained from Volvo. After learning of the Volvo Vision and its stated goal of reducing the number of authorized Volvo dealers, as well as mistakenly receiving faxes from Volvo intended for other dealers which listed larger concessions than Reeder was getting, Reeder came to suspect it was one of the dealers Volvo sought to eliminate.

A. Head-to-Head Competition with Another Dealer for the Same Customer.

Reeder presented evidence that in the summer of 1999, it bid on the sale of twelve trucks to Hiland Dairy Company located in Springfield, Missouri. Reeder requested a 12% concession, but Volvo authorized only 7.5%. Another Volvo authorized dealer, Southwest Missouri Truck Center in Springfield, successfully obtained the Hiland Dairy contract when Volvo granted it an 8.5% concession. As a result of the difference in price concessions, Southwest could offer the Missouri customer a price of $62,890 per truck, while Reeder's price per truck was $63,632.69. Had Reeder obtained the account, it would have realized a gross profit of $30,000 on the sale.

B. Contemporaneous Sales of Like Grade and Quality Trucks in Which Favored Volvo Dealers Received Greater Price Concessions than Reeder.

In March 1998, Reeder successfully bid on the sale of thirty trucks to Lane Freight located in Tulsa, Oklahoma, involving a mixture of over-the-road day-cab and sleeper-cab trucks. Reeder initially requested a 12.51% concession on this sale. When Volvo denied the request, Reeder asked for a 10%

concession on the day-cab trucks and 8.4% on the sleepers. Volvo ultimately granted a 9% concession on both truck types. Two months earlier, Volvo had granted a dealer located in Tyler, Texas, a 12.3% concession on the sale of twelve trucks of like grade and quality to Brookshire Grocery located in Tyler. As a result of the difference in concessions, the price Reeder's customer paid for each truck was $2,606 higher than the price the Texas dealer provided to its customer. Had Volvo offered Reeder the 12.3% concession the Texas dealer received, Reeder would have realized $52,120 in additional profits.[2]

In February 1997, Reeder successfully bid on the sale of two dump trucks to the city of Fort Smith, Arkansas. Volvo granted Reeder a 19% concession on the sale. Three months earlier, Volvo had granted a Kansas City, Missouri, dealer a 21% concession on a sale of two trucks of like grade and quality to Rapidways, a customer located in Kansas City. Once again, had Volvo offered Reeder the same price concession the Kansas City dealer received, Reeder would have realized additional profits for its sale.

In November 1996, Reeder successfully bid on the sale of twenty trucks to New Hi-Way, another Fort Smith customer. Volvo granted Reeder a 24.2% concession on the sale. In February 1997, Volvo granted a Kahoka, Missouri, dealer a 27.3% concession on the sale of five trucks of like grade and quality to Harold Dickey Transport, a customer located in Kahoka. Reeder would have realized higher profits from its

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[2] Reeder also presented evidence showing Lane Freight wanted to add additional trucks to the sale, but Volvo denied Reeder even the original 9% concession, and offered only a 7% concession on the additional trucks. Volvo's conduct caused Reeder to lose profits on the sale of these additional trucks and damaged Reeder's relationship with Lane Freight to the extent that Reeder lost all future sales to Lane Freight.

successful sale had Volvo granted it a price concession similar to the one offered the other dealer.

In February 1996, Reeder successfully bid on the sale of three trucks to Sam Ludington, another Fort Smith customer. Volvo granted Reeder a concession of 13.27% on this sale. At trial, Reeder compared this three-truck sale to three single-truck sales of like grade and quality trucks made by three separate dealers (in Kansas City, Missouri; Sikeston, Missouri; and Memphis, Tennessee) in September 1996, April 1996, and February 1996. In all three instances, the price concessions Volvo granted the other dealers exceeded the price concession given to Reeder, 18.04%, 15.42%, and 14.53%, respectively.

C. Unsuccessful Sales Following Volvo's Refusal to Grant Requested Price Concessions.

In a third category of evidence Reeder presented to prove price discrimination, Reeder recounted numerous situations in which it unsuccessfully requested particular concessions from Volvo to close sales, while during the same time frame Volvo granted higher concessions to other Volvo dealers who were able to close sales. For example, in January 1998 Reeder was working on the sale of 170 trucks to Beach Trucking. Reeder requested a price concession of 26.7%, but Volvo only approved 23.8%. Reeder did not get the Beach Trucking contract. During the same time, Volvo gave another dealer a higher price concession on a smaller number of the same trucks, a 26.1% concession on sixty trucks. The other dealer got its contract. In May 1998, Reeder sought a price concession of 21% on a sale of five trucks. Volvo approved only 2%. Reeder did not get its contract. During the same time, Volvo gave another dealer a 10.6% concession on a sale of three trucks of like grade and quality. The other dealer got its contract.

The jury returned a verdict in favor of Reeder on both claims and awarded damages of $1,358,000 on the RPA claim

and $513,750 on the AFPA claim. The trial court trebled the RPA damages pursuant to 15 U.S.C. § 15a and awarded Reeder attorney fees. Volvo brought a motion for JAML following trial. The district court denied the motion, and Volvo filed a timely appeal with this court.[3]

II

"We review the denial of a motion for JAML de novo." Naucke v. City of Park Hills, 284 F.3d 923, 929 (8th Cir. 2002). Although our review is de novo, a party seeking posttrial JAML, based on the sufficiency of the evidence "faces an onerous burden [because we must] view the evidence in a light most favorable to the jury's verdict [and reverse only] when there is a complete absence of probative facts to support the conclusion reached." Inacom Corp. v. Sears, Roebuck & Co., 254 F.3d 683, 689 (8th Cir. 2001).

A. The RPA Claim

The RPA provides, in pertinent part:

> It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

15 U.S.C. § 13(a).

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[3] Reeder did not cross-appeal the district court's grant of summary judgment in favor of Volvo on the alleged primary-line RPA violation.

There are three types of violations under the RPA. Primary-line violations occur when a seller's price discrimination adversely impacts competition with its own competitors. Secondary-line violations occur when a seller's price discrimination injures competition among its customers. Tertiary-line violations occur when a discriminating seller's purchasers do not compete directly, but their customers compete within a unified market region. Godfrey v. Pulitzer Publ'g Co., 161 F.3d 1137, 1140 (8th Cir. 1998) (Godfrey I). In the instant case, Reeder avers a secondary-line violation, claiming Volvo's price discrimination injured competition among Volvo's customers, i.e., Reeder and other Volvo dealers.

To prove its claim, Reeder had to show 1) Volvo discriminated in price between Reeder and the favored dealers, 2) this price discrimination substantially affected competition between Reeder and the favored dealers, 3) the truck sales occurred in interstate commerce, and 4) the trucks sold by Reeder and the other dealers were of like grade and quality. Godfrey v. Pulitzer Publ'g, Inc., 276 F.3d 405, 408 (8th Cir. 2002) (Godfrey II). In addition, because the RPA prohibits price discrimination "between different purchasers," 15 U.S.C. § 13(a), Reeder had to show there were actual sales at two different prices to two different Volvo dealers, i.e., a sale to itself and a sale to another Volvo dealer. Fusco v. Xerox Corp., 676 F.2d 332, 335 (8th Cir. 1982). In other words, as a threshold matter Reeder had to show it was a "purchaser" within the meaning of the RPA. Id. at 334.

1. Two-Purchase Requirement

Volvo contends competitive bidding situations do not implicate the RPA because an unsuccessful bidder is not a purchaser. Volvo emphasizes that much of Reeder's proof involved situations where Reeder did not purchase trucks from Volvo. Reeder did not purchase trucks from Volvo in the head-to-head competition with another dealer for the Hiland Dairy

contract, for example, because the other dealer got the contract. Likewise, Reeder did not actually purchase trucks from Volvo in those situations where Reeder compared its unsuccessful bids to other dealers' successful sales based on better price concessions.

We agree an unsuccessful bidder is not a purchaser within the meaning of the RPA. In Fusco, we said a purchaser is one who actually makes a purchase, not "one who [merely] seeks to purchase, a person who goes into the market-place for the purpose of purchasing." 676 F.2d at 335 (quoting Shaw's Inc. v. Wilson-Jones Co., 105 F.2d 331, 333 (3d Cir. 1939)). "Thus, a sale at one price plus either an offer to sell at a higher price or a refusal to sell at any price is generally thought not to violate the [RPA]." Id. (citing M.C. Mfg. Co. v. Texas Foundries, Inc., 517 F.2d 1059, 1065 n.11 (5th Cir. 1975)). When Reeder unsuccessfully bid on contracts because Volvo's price concessions were not favorable enough to obtain the contracts, Reeder did not actually purchase trucks from Volvo. Thus, Reeder was not a purchaser in those instances, but merely went into the market-place for the purpose of purchasing. Volvo may have offered to sell trucks to Reeder at a higher price than it offered to other dealers, but mere offers to sell do not violate the RPA.

This conclusion is consistent with the conclusion of many courts that hold price discrimination in the competitive bidding process does not violate the RPA because only one of the two competitors actually makes a purchase. See, e.g., Terry's Floor Fashions, Inc. v. Burlington Indus., Inc., 763 F.2d 604, 615 (4th Cir. 1985) (holding carpet dealer, who alleged carpet manufacturer offered a competing dealer more favorable price quotes during the competitive bidding process for commercial carpet contracts, failed to state a claim under the RPA because the dealer "had not shown, or even alleged, two comparable, completed sales"); Shaw's, Inc. v. Wilson-Jones Co., 105 F.2d

331, 334 (3d Cir. 1939) ("[The RPA] does not compel a seller of commodities to offer them to all persons who may wish to bid upon a contract to resell them to a third party."); Maier-Schule GMC, Inc. v. Gen. Motors Corp., 780 F. Supp. 984, 989 (W.D.N.Y. 1991) (holding truck dealer failed to state an RPA claim against Volvo and other truck manufacturers by offering dealer's three competitors more favorable discounts where plaintiff dealer purchased no trucks during the relevant time period); Olympia Co. v. Celotex Corp., 597 F. Supp. 285, 297 (E.D. La. 1984) ("[T]he Act protects purchasers in competition with one another at the time of the purchases; it is irrelevant that the companies may have entered into competitive bidding, or that the successful bidder was ultimately able to obtain prices below those offered to its competitors in the bidding process."); but see American Can Co. v. Bruce's Juices, Inc., 187 F.2d 919, 924 (5th Cir. 1951) (suggesting an exception to the two-purchase requirement when the plaintiff's failure to purchase is directly attributable to the defendant's discriminatory pricing practice); Indus. Burner Sys., Inc. v. Maxon Corp., 275 F.Supp. 2d 878, 886 (E.D. Mich. 2003) (recognizing the exception and denying summary judgment motion even though RPA plaintiff was nothing more than an unsuccessful bidder).

In this case, however, Volvo concedes Reeder was more than an unsuccessful bidder. Reeder gave four examples where it actually purchased Volvo trucks following successful bids on contracts. Reeder compared those successful sales to actual sales made by other dealers during the same time period (Reeder purchased fifty-five trucks and compared those purchases to other dealers' purchases of twenty-two trucks). Although Volvo challenges the sufficiency of these actual purchase-to-purchase comparisons on other grounds (addressed below), these successful bids clearly gave Reeder "purchaser" status. As a result, it follows Reeder was entitled to pursue a claim for price discrimination under the RPA. See, e.g., DeLong Equip. Co. v. Washington Mills Electro Minerals

Corp., 990 F.2d 1186, 1202 (11th Cir. 1993) (recognizing that even "minimal sales" (i.e., minimal purchases from manufacturer) made by an otherwise unsuccessful bidder are enough for bidder to state an RPA claim).

2. Actual Competition

Volvo argues Reeder failed to show it was in actual competition with the favored dealers. The standard for showing actual competition is whether, "as of the time the price differential was imposed, the favored and disfavored purchasers competed at the same functional level, i.e., all wholesalers or all retailers, and within the same geographic market." Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578, 585 (2d Cir. 1987). Here there is no dispute the dealers all competed at the same functional level, but Volvo contends Reeder did not compete within the same geographic market as the favored dealers. We disagree.

Although Reeder had an assigned geographic area (ten counties in western Arkansas and two counties in eastern Oklahoma), it was free to sell outside that area, and did so. Reeder introduced evidence that it looked to the entire continental United States in making its sales, and had sold or delivered trucks in Arkansas, Oklahoma, Missouri, Texas, Iowa, Illinois, Minnesota, Ohio, Pennsylvania, North Carolina, Georgia, Colorado, and Oregon. Reeder also established that end-buyers of the trucks are very mobile and price-shop nationwide.

Reeder's evidence focused upon sales and bids made in the southwest region of the United States. Reeder presented evidence of sales or bids it made in three states in the southwest region (Arkansas, Missouri, and Oklahoma) and compared the sales or bids to those made by other dealers in four states in the southwest region (Arkansas, Missouri, Texas, and Tennessee). Reeder presented at least two instances where it competed

directly with a favored dealer – the head-to-head competition with Southwest Missouri Truck Center in Springfield, Missouri, for a twelve-truck deal to Hiland Dairy, and a concession request from Reeder for a five-truck deal to Tommy Davidson which also involved a bid made by a Volvo dealer in Springdale, Arkansas. Finally, Reeder presented evidence about Volvo's designated Southwest Region to show there were no natural or physical barriers that would restrict the flow of heavy trucks in commerce or affect the freedom of customers to travel throughout the region to purchase heavy trucks. From this evidence a jury could reasonably decide Reeder was in actual competition with favored dealers. See Godfrey II, 276 F.3d at 411 ("[A]lthough . . . dealers operate in exclusive geographic territories, that fact is not dispositive on the question of competition. Even where parties operate in airtight territories, they compete if the end-buyers of the product can freely travel between the geographic areas to purchase the commodity in question.").

3. Like Grade and Quality; Reasonably Contemporaneous in Time

To establish an RPA violation, Reeder had to show the comparative sales involved trucks of like grade and quality. Id. at 408. Products are not of like grade and quality "if there are substantial physical differences in products affecting consumer use, preference or marketability." Checker Motors Corp. v. Chrysler Corp., 283 F.Supp. 876, 889 (S.D.N.Y. 1968), aff'd, 405 F.2d 319 (2d Cir. 1969). Volvo argues the sales-to-sales comparisons made by Reeder involved trucks with different major components that affected consumer preference and marketability. In support of its position Volvo points to trial testimony which showed differences in truck components influence consumers' decisions to buy – particularly engine types and gear ratios.

Reeder offered testimony, however, showing that any differences in components were inconsequential – in all cases the trucks were the same model and same year, with comparable engines and largely similar components. Also, Reeder provided evidence that the differences in components were taken into account in the calculation of the price quotes and concessions, so the jury could reasonably conclude that when the comparisons involved trucks with somewhat different components, the differences did not substantially affect the concessions Volvo offered.

We note the RPA says the commodities involved must be of *like* grade and quality, not *identical* grade and quality. We have previously indicated the concept "was designed to serve as one of the necessary *rough guides* for separating out those commercial transactions insufficiently comparable for price regulation by the statute." Moog Indus. v. Fed. Trade Comm'n, 238 F.2d 43, 50 (8th Cir. 1956) (quoting the Report of the Attorney General's Nat'l Comm. to Study the Anti-Trust Laws 157 (1955)) (emphasis added). We believe our comments have been correctly interpreted to reflect a "sensible approach," and a "somewhat flexible application" of the like grade and quality concept. White Indus., Inc. v. Cessna Aircraft Co., 657 F. Supp. 687, 698 (W.D. Mo. 1987) (applying Moog).

Here, the jury was instructed on the concept of like grade and quality, and Volvo does not argue the district court erred in its instructions. The jury found by special interrogatory the comparisons involved trucks of like grade and quality. We acknowledge there was conflicting evidence on the substantiality of the differences in components, but there was ample evidence supporting the jury's determination the differences were immaterial. "There was conflicting evidence on this issue, and it could have gone either way. Making decisions of this kind is exactly what juries are for." GLB

Enters., Inc. v. United States, 232 F.3d 965, 969 (8th Cir. 2000) (quotation omitted).

Reeder also had to show the comparative sales were reasonably contemporaneous in time, but "there is no requirement that the two sales be made at precisely the same time or place." DeLong Equip., 990 F.2d at 1202 (11th Cir. 1993). The four sales-to-sales comparisons offered by Reeder were between one and four months apart, with one exception; Reeder compared its three-truck sale to Sam Ludington in February 1996 to three separate one-truck sales by other dealers, and one of those sales took place in September 1996 (another took place in February 1996 and the third in April 1996). Volvo argues the sales were not contemporaneous because as little as a single-month gap could make a substantial difference in the price concession it offered due to changes in model-year availability or backlog or both. Volvo refers us to a part of the trial transcript that says exactly that, as little as a month "*could* make a difference." Volvo's Brief at 35 (referring to App. 1623) (emphasis added). Volvo never presented evidence, however, to show the gaps between the sales comparisons involved in this case *did* make a difference in the price concessions it offered. Again, the jury was instructed on the issue whether the comparative sales occurred at about the same time, found by special interrogatory that they did, and Volvo does not challenge the district court's instructions. Under the standard we must apply in reviewing a motion for JAML, we find no basis for disturbing the jury's verdict.

4. Injury/Damages

a. Competitive Injury

The RPA prohibits price discrimination "where the effect of such discrimination may be substantially to lessen competition . . . or to injure, destroy, or prevent competition."

5 U.S.C. § 13(a). The RPA "guards against injury to competition, not injury to individual competitors." Rose Confections, Inc. v. Ambrosia Chocolate Co., 816 F.2d 381, 387 n.3 (8th Cir. 1987). The RPA does not, however, "require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect." Corn Prods. Ref. Co. v. Fed. Trade Comm'n, 324 U.S. 726, 742 (1945).

A plaintiff may demonstrate a reasonable possibility of competitive injury in two ways. "First, plaintiff may introduce direct evidence that disfavored competitors lost sales or profits as a result of the discrimination." Rose Confections, 816 F.2d at 385 (citing Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 437-38 (1983)). In other words, while the RPA does not guard against injury to individual competitors, proving injury to individual competitors is one way to demonstrate a discriminatory practice likely injured competition. "Second, [a plaintiff] can show that the favored competitor received a substantial price reduction over a substantial period of time, which gives rise to a permissible inference of competitive injury." Id. (citing Fed. Trade Comm'n v. Morton Salt Co., 334 U.S. 37, 50-51 (1948)). Volvo argues Reeder failed to demonstrate a reasonable possibility of competitive injury because Reeder did not prove the lower concessions Volvo granted to other dealers drew sales away from Reeder. We disagree.

The evidence presented by Reeder was sufficient for the jury to conclude Volvo's discriminatory concessions resulted in lost profits and sales to Reeder and other dealers, and that favored competitors received substantial price reductions over a substantial period of time. As stated above, Volvo acknowledged in December 1997 that it wanted to cut the number of its dealers in half as part of its "Volvo Vision." At trial, Volvo acknowledged it had, in fact, succeeded in reducing

the numbers of its dealers. While admitting 1998 was a good market for the sale of heavy trucks overall and 1999 was Volvo's "record year," App. 1340, Volvo nevertheless sent approximately twenty termination letters to Volvo dealers in 1999 and early 2000, and placed another twenty or so dealers on probation during the same time period. From this evidence, the jury could properly infer Volvo's intent to reduce the number of its dealers manifested itself in the discriminatory concession practices.

Reeder also presented evidence that it lost profits and sales as a result of Volvo's price concession practices. For example, in the head-to-head competition with Southwest Missouri Truck Center for the Hiland Dairy contract, Reeder lost gross profits of $30,000. On the Lane Freight sale, one of the four sales-to-sales comparisons Reeder presented to prove its purchaser status, Reeder lost gross profits of $52,120. Reeder also presented evidence from which the jury could conclude Volvo's discriminatory practice cost Reeder all future sales to Lane Freight. Reeder's evidence showed it lost gross profits on the other sales-to-sales comparisons as well.

Reeder showed its sales of Volvo trucks had been solid prior to the period of Volvo's price discrimination (1996-2000). During the period of discrimination, Reeder's sales decreased substantially and its profit margins were lower despite increased sales efforts. In all, Reeder's gross profits fell from $165,499 in 1996 to $26,327 in 2000. At the time, favored dealer's sales and overall market sales stayed strong. Based on this evidence, the jury could reasonably conclude Reeder's average gross profit was lower than the average of favored Volvo dealers because Volvo discriminated against Reeder in its price concessions.

Reeder also presented evidence that Volvo's practice extended over a substantial period of time (1996-2000). In addition, the evidence established that dealer profit margins

were narrow during that time. Thus, the jury could reasonably conclude even small differences in price concessions had a substantial impact on competition.

b. Actual Injury

Although Reeder only needed to prove competitive injury *may* result to establish a violation of 15 U.S.C. § 13(a), it had to make some showing of actual injury to itself to recover treble damages under 15 U.S.C. § 15(a). See, e.g., J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1539-40 (3d Cir. 1990) (discussing the difference between demonstrating competitive injury under § 13(a) and proving actual injury under § 15(a)). Volvo argues Reeder did not show actual injury because Reeder offered too few examples of Volvo's discriminatory practices, there was no evidence the favored dealers sold the trucks to end-users at lower retail prices, and no evidence the end users selected the favored dealers' bids because of the lower prices. We believe Volvo construes too narrowly the requirements for proving actual injury.

In addressing whether Reeder proved it was actually injured by Volvo's price discrimination, Volvo would have us limit our analysis to the one instance of direct head-to-head competition with Southwest Missouri Truck Center for the Hiland Dairy contract and the four sales-to-sales comparisons Reeder offered to prove its purchaser status, while disregarding all the other evidence offered to prove actual injury. We believe such an approach is inconsistent with the Supreme Court's teachings, both with respect to the role circumstantial evidence plays in RPA claims and the scope of injury to be remedied by the RPA.

Reeder presented other substantial evidence to prove competitive and actual injury. Reeder presented numerous instances of its unsuccessful sales due to Volvo's failure to grant requested price concessions, and evidence of Volvo's admitted intentions to reduce the number of its dealers. Indeed,

Reeder showed Volvo successfully reduced the number of its dealers and placed many more on probation during a "record" sales period. Reeder presented evidence that its own sales and profits were substantially reduced during this boom in the heavy truck industry, despite an increase in its own sales efforts. From this evidence the jury could reasonably infer Volvo's discriminatory practice and Reeder's injuries extended beyond the five specific head-to-head and sales-to-sales comparisons.

In Perkins v. Standard Oil Co., 395 U.S. 642 (1969), the Supreme Court discussed the role of circumstantial evidence in proving the causal connection between a defendant's discriminatory pricing practices and the plaintiff's damages. Perkins, a gasoline retailer, alleged price discrimination between itself and a competitor, Regal, another gasoline retailer far down the distribution ladder from Standard. There was no direct evidence Regal sold the gasoline to its customers at lower retail prices than did Perkins because of the price discrimination, and no direct evidence Regal's customers selected their gasoline over Perkins's because of lower prices. Nevertheless, the Supreme Court upheld the jury's verdict against Standard and in favor of Perkins based no circumstantial evidence.

> If there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what that evidence proves is for the jury. Here the trial judge properly charged the jury that Perkins had the burden of showing that any damage to his business was proximately caused by Standard's price discriminations and there was substantial evidence from which the jury could infer causation. There was evidence that Signal received a lower price from Standard than did Perkins, that this price advantage was passed on, at least in part, to Regal, and that Regal was thereby able to undercut Perkins' price on gasoline. Furthermore, there was

> evidence that Perkins repeatedly complained to Standard officials that the discriminatory price advantage given Signal was being passed down to Regal and evidence that Standard officials were aware that Perkins' business was in danger of being destroyed by Standard's discriminatory practices. This evidence is sufficient to sustain the jury's award of damages under the Robinson-Patman Act.

Perkins, 395 U.S. at 648-49 (internal citation omitted).

Likewise, here there was sufficient evidence from which the jury could infer favored dealers received lower prices from Volvo than did Reeder, and this price advantage allowed other dealers to undercut Reeder's prices, hurting Reeder's sales and profits. There was also evidence Volvo was aware this discriminatory practice could destroy Reeder's business; indeed, the elimination of some dealers like Reeder appeared to be Volvo's intent. This is precisely the type of injury the antitrust laws were meant to prevent. See Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125 (1969) (permitting causality to be inferred from circumstantial evidence where the injury involved was "precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause."). Moreover, Reeder was not required to prove Volvo's price discrimination was the only reason for its injuries, or the only reason for heavy truck customers' purchasing decisions – it was enough that Reeder showed the price discrimination was a "material" cause of its injuries. Id. at 114 n.9 ("It is enough that the illegality is shown to be a material cause . . . a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4.")

Volvo would also have us limit the scope of Reeder's injury to the four sales-to-sales comparisons which Reeder presented to prove its purchaser status. The Supreme Court has, however, eschewed an approach whereby damages are mechanically

calculated simply by comparing the price differentials of a defendant's actual transactions between favored and disfavored competitors. "Damages resulting from illegal price discrimination may not be measured merely by determining the overcharge to the disfavored buyer, i.e., the excess paid by disfavored buyer for the goods it purchased." Hasbrouck v. Texaco, Inc., 842 F.2d 1034, 1043 (9th Cir. 1988) (citing J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 557 (1981)). Instead, Reeder had both the burden and opportunity of proving damages "on the basis of plaintiff's estimate of sales it could have made absent the violation." J. Truett Payne, 451 U.S. at 565 (citing Zenith Radio, 395 U.S. at 123-24). Thus, Reeder was entitled to present evidence beyond the price differential of the four specific sales-to-sales comparisons it offered to prove its purchaser status, and the jury was free to award damages beyond those transactions.

c. Calculation of Damages

Finally, Volvo challenges the proof Reeder presented to calculate the amount of its damages. We reject this challenge. Having established an actual injury caused by Volvo's antitrust violations, Reeder will not be held to stringent burdens in proving the actual amount of those injuries. See Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-66 (1946). The jury may not render its verdict based on speculation or guesswork, but it may make a just and reasonable estimate or approximation. Id.

> [D]amage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other

> causes, that defendants' wrongful acts had caused damage to the plaintiffs.

Zenith Radio, 395 U.S. at 123-24 (citations, internal quotations omitted).

Underpinning most of Volvo's complaints about the calculation of damages is its claim the district court erred in permitting one of Reeder's co-owners, Bill Heck, to testify about Reeder's lost profits and the value of the company. We note the district court has broad discretion in determining whether to admit lay or expert testimony, Anderson v. Raymond Corp., 340 F.3d 520, 523 (8th Cir. 2003); United States v. Oliver, 908 F.2d 260, 263-64 (8th Cir. 1990), and we find no abuse of discretion under these circumstances where Reeder laid the proper foundation to show Heck's knowledge, as a business owner, of the business's value and its lost profits. See Mississippi Chem. Corp. v. Dresser-Rand Co., 287 F.3d 359, 373 (5th Cir. 2002) (collecting cases allowing lost profit testimony where the witness has direct knowledge of the business accounts underlying the profit calculation).

Volvo attacks as pure speculation Heck's use of a multiplier in calculating the value of the Volvo franchise to Reeder. Heck testified multipliers were often used to calculate the value of truck franchises and he selected one based on his knowledge of current practices. Volvo's own experts confirmed multipliers are thus used. The only difference in opinion between Volvo's experts and Heck was which multiplier to use. Volvo's experts would have used a multiplier of two, three or four, while Heck used five. We find Volvo's challenge to Heck's use of a multiplier to be without merit. Volvo does not argue why five in particular was speculative, only that Heck had no basis for choosing it. Indeed, Volvo's experts did not testify five was improper, only that they would have used a lower multiplier. We conclude it was for the jury to determine the relative credibility of the witnesses, and resolve this conflict in the evidence. Furthermore, the district court instructed the jury it

could not award damages based on the value of the lost franchise, and could use that figure only for guidance in determining Reeder's lost profits. Volvo did not object to that instruction, and does not aver error in the instruction.

Reeder further calculated its damages by subtracting its actual sales in the years of Volvo violations (1996-2000) from the sales objectives set by Volvo for those same years. The result represented the number of trucks Reeder argued it would have sold absent Volvo's wrongdoing. That number was then multiplied by Reeder's average gross profits per truck. Reeder also provided alternative evidence of the average gross profits of all Volvo dealers, which when multiplied by the estimated number of lost truck sales, yielded amounts similar to the results obtained when subtracting actual sales from Volvo's sales objectives. From these estimates Reeder subtracted certain expenses, including commissions to salespersons and advertising. Thus, the jury had several reasonable figures from which to choose in calculating damages.

Volvo argues Volvo's sales objectives bore no reasonable relationship to Reeder's lost profits, so it was improper to compare the sales objectives to Reeder's actual sales. But Volvo's own witnesses testified its sales objectives were reasonable. The objectives were calculated using market data and were intended by Volvo to represent a reasonable "minimum performance" expectation of each individual franchise. It was further established at trial Reeder met, and sometimes exceeded, Volvo's objectives before the onset of the alleged price discrimination period.

In sum, we believe Volvo's argument essentially reduces to a demand there be a stronger causal link proved between every dollar of damages awarded and Volvo's antitrust violations. We conclude that argument is inconsistent with the relaxed standard applied to a plaintiff's ascertainment of damages, after having established actual injury. E.g., Bigelow, 327 U.S. at 264-66. The relationship between likely sales and actual sales

is precisely the relationship that should guide an estimate of damages in a price discrimination action. It is imprecise to be sure, but that imprecision cuts against Volvo. See J. Truett Payne, 451 U.S. at 566 ("[I]t does not 'come with very good grace' for the wrongdoer to insist on specific and certain proof of the injury which it has itself inflicted.") (quoting Bigelow, 327 U.S. at 264-65).

B. The AFPA Claim

Volvo contends the district court lacked subject matter jurisdiction over Reeder's AFPA claim. Volvo advances several arguments to support this premise. First, because Reeder's allegations concern the franchise relationship between a motor vehicle dealer and manufacturer, Volvo claims the allegations are governed by the Arkansas Motor Vehicle Commission Act (AMVCA), Ark. Code Ann. § § 23-112-101 through 23-112-706, rather than the AFPA. Volvo contends the AMVCA is more specific than the AFPA as applied to the franchise relationship involved here, and therefore controls. Next, Volvo argues Reeder must exhaust its administrative remedies before the Arkansas Motor Vehicle Commission (Commission) before filing a civil action for a violation of the AMVCA. Finally, Volvo contends the AMVCA requires Reeder to prove a "willful" violation of its provisions before recovering damages in a civil action, see Ark. Code Ann. § 23-112-05, and Reeder's sole source of statutory remedies are comprised in the AMVCA's remedy provisions. We disagree with Volvo's ultimate contention – that the district court lacked jurisdiction – because we disagree with each of Volvo's arguments.

Volvo's first argument is the AMVCA is more specific than the AFPA as applied to the franchise relationship between a motor vehicle dealer and manufacturer, and because the two statutory schemes conflict, the AMVCA should govern. See, e.g., Valley Nat'l Bank of Ariz. v. Stroud, 711 S.W.2d 785, 786 (Ark. 1986) ("In statutory construction where specific

expressions conflict with general expressions, the rule is to give greater effect to the specific expression.").

We have doubts about which of the two statutory schemes is more specific as applied to the franchise relationship between a motor vehicle dealer and a manufacturer. The AMVCA is a regulatory statute governing the relationships not only between dealers and manufacturers, but also salespersons, lessors/lessees, distributors and their representatives, factories and their representatives, and others in the motor vehicle industry. The AMVCA empowers the Commission to set professional standards and grant and revoke licenses. Thus, while the AFPA is broader in the sense it covers all franchise relationships, not just those involving motor vehicle dealers and manufacturers, the AMVCA is broader in that it covers all relationships in vehicle sales, not just franchise relationships. The relationship between Volvo and Reeder falls in the confluence of the two statutes.

We need not resolve which of the statutes is more specific than the other as applied to this fact pattern, however, because we conclude Volvo's first argument fails based on the application of other principles. Clearly, both statutory schemes relate to the subject matter of franchise relationships between motor vehicle dealers and manufacturers, and those we must read them "in a harmonious manner if possible." City of Fort Smith v. Tate, 844 S.W.2d 356, 359 (Ark. 1993) ("All statutes on the same subject are *in pari materia* and must be construed together and made to stand if capable of being reconciled."). Arkansas law further directs us to "view[] them [i.e., the two statutory schemes,] as a single system, and giv[e] effect to the general purpose of the system." Arkansas County v. Desha County, 27 S.W.3d 379, 383 (Ark. 2000).

The AMVCA specifically allows for the courts, not the Commission, to award damages and attorney fees to a licensee harmed by willful violations of the statutory scheme. See Ark. Code. Ann. § 23-112-105. Likewise, the AFPA provides a civil

remedy for franchisees harmed by franchisors acting in a commercially unreasonable manner. See Ark. Code. Ann. § § 4-72-206 (making it unlawful for franchisors to "refuse to deal with a franchise in a commercially reasonable manner") & 4-72-208 (providing a private right of action to franchisees harmed by a violation of the AFPA). Thus, we have little trouble concluding both statutory schemes give persons or entities harmed by a violation of the statutes the right to sue in court, and at least one purpose of the overall system seems to be to protect persons or entities like Reeder from persons or entities like Volvo. We therefore find no conflict between the remedies provisions of the two statutes, and see no reason why a franchisee/licensee like Reeder could not choose to pursue remedies under either statutory scheme.

Furthermore, assuming arguendo a conflict between the two remedial statutes, we believe AFPA's would control because it was enacted two years after the AMVCA. See Kyle v. State, 849 S.W.2d 935, 937 (Ark. 1993) ("The settled rule of statutory construction is that if two legislative acts relating to the same subject are in conflict with each other, the later act controls."). The AFPA refers to three specific franchise situations where the Arkansas legislature directed it would not apply. See Ark. Code Ann. § 4-72-203 (indicating the AFPA does not apply to "franchises subject to the provisions of § 4-702-401 et seq. and § 4-72-501 et seq., or which are subject to the Federal Trade Commission [Franchise Rule], 16 C.F.R. 436.1 et seq."). Notably absent is a reference to franchises subject to the provisions of the AMVCA. Because the Arkansas legislature expressly noted those situations where the AFPA would not apply, we conclude it would have expressly referred to the AMVCA if it intended franchises covered by both Acts to be limited to the remedies available under the AMVCA. See Chem-Ash, Inc. v. Ark. Power and Light Co., 751 S.W.2d 353, 354 (Ark. 1988) ("It is fundamental statutory construction law that the express designation of one thing may properly be construed to mean the exclusion of another.").

Volvo's next argument is that Reeder must exhaust the administrative remedies established by the AMVCA before filing this civil action against Volvo. Again, we disagree. The Commission's power is limited to granting injunctions,[4] revoking licenses,[5] or imposing fines payable to the state treasury,[6] so the Commission could not award damages to Reeder. Exhaustion of administrative remedies is not required if those remedies are inadequate. See, e.g., Cummings v. Big Mac Mobile Homes, Inc., 980 S.W.2d 550, 552 (Ark. 1998) (holding plaintiffs not required to exhaust remedies with the Arkansas Manufactured Home Commission when the Commission only provided damages for the cost of repairs and the plaintiffs asserted their mobile home was beyond repair); Delta Sch. of Commerce, Inc. v. Harris, 839 S.W.2d 203, 207 (Ark. 1992) ("Inadequate administrative remedies need not be exhausted.").

Finally, since the AMYCA requires Reeder to prove a willful violation of its provisions before recovering damages in a civil action, Volvo posits Reeder should not be entitled to recover damages under the AFPA's less-stringent standard. As stated above, however, we see no conflict between the two statutory schemes. And as we noted, the Arkansas legislature specifically mentioned those situations where the AFPA would not apply and did not refer to franchise situations governed by the AMVCA. From this we discern no legislative intent to limit the remedies of motor vehicle franchisees to the more stringent standard required by the AMVCA.

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[4] Ark. Code Ann. § 23-112-104.

[5] Ark. Code Ann. § 23-112-308.

[6] Ark. Code Ann. § § 23-112-205 & 23-112-309.

In sum, the AMVCA did not impose an impediment to Reeder's suit for damages under the AFPA, and the district court had jurisdiction over this matter.

III

We affirm the judgment entered in the district court in all respects.

HANSEN, Circuit Judge, concurring in part and dissenting in part.

Although I do not disagree with the court's resolution of the state law issue, I write separately to express my view that Reeder has failed to make out a claim under the Robinson-Patman Act. Even viewing all of the evidence in the light most favorable to the verdict, I conclude that Reeder cannot prove the necessary elements to recover treble damages in this case. Specifically, Reeder has not proven a violation of § 13(a) because the facts fail to show injury or likelihood of injury to actual competition between Reeder and the "favored" Volvo dealers. Furthermore, even if we assume that Volvo violated § 13(a), there is absolutely no indication that any such violation was the cause of Reeder's injury, for the purpose of recovering damages under § 15(a). I therefore respectfully dissent from Section II(A) of the court's opinion.

There is little doubt that the facts of this case fail to fit neatly into the framework that courts have established in analyzing Robinson-Patman Act secondary-line claims. Much of my disagreement in this case stems from what I perceive as the court's attempt to fit a square peg into a round hole. Traditional RPA cases involve sellers and purchasers that carry inventory or deal in fungible goods. By contrast, the parties in this case operate in a unique marketplace where special-order products are sold to individual, pre-identified customers only after competitive bidding. By its very nature, this process will never produce the kind of competition the RPA was designed to protect because it will never result in the type of two-

purchase transaction that itself creates a market for the goods that are sold. Indeed, where, at the time of the end purchase, only one possible seller and one possible buyer exist, competition is totally absent. It is the nature of competitive bidding, not price discrimination, that makes it so.

The court properly recognizes that a competitive bidding situation will never involve two "purchasers," and thus always will fall outside of the purview of the RPA. Despite this determination, however, the court goes on to conclude that Reeder's purchases with respect to four transactions give it "purchaser status" as to separate instances in which it did not make a purchase, and therefore was not in fact a purchaser. I disagree with this proposition. Reeder cannot piggyback nonpurchaser transactions onto purchaser transactions for purposes of recovering under the RPA. My concern does not stem from a strict adherence to the two-purchase requirement, but rather from my belief that "purchaser status" is inextricably intertwined with the existence of actual competition and the possible threat thereto. Because my primary objection to the court's opinion is that it overlooked this important aspect of actual competition, I turn next to that issue.

Despite the fact that Reeder operates at the same functional level as the "favored" Volvo dealers and that they may do business in the same or overlapping geographic areas, I nevertheless conclude that Reeder has failed to prove that it was in actual competition with the "favored" Volvo dealers. There certainly may exist a national market in which heavy-truck dealers compete to receive the opportunity to bid on potential sales to customers. The Volvo dealers in this case very well may have competed against each other in this market on a regular basis. However, any difference in price that Volvo eventually may quote to a dealer who actually bids on a potential sale has no effect on this market. The evidence shows that an end user's decision to request a bid from a particular dealer or to allow a particular dealer to bid is controlled by such factors as an existing relationship, geography, reputation, and

cold calling or other marketing strategies initiated by individual dealers. Once bidding begins, however, the relevant market becomes limited to the needs and demands of a particular end user, with only a handful of dealers competing for the ultimate sale. Cf. FTC v. Fred Meyer, Inc., 390 U.S. 341, 349 (1968) (Section 2(d) "reaches only discrimination between customers competing for resales at the same functional level...."). Thus, although Reeder and other "favored" dealers may have competed generally with each other in the larger market for obtaining bids, there is evidence of only two occasions where Reeder competed with a "favored" Volvo dealer for an actual sale. Reeder's attempt to compare a sale that it made to one end user to a sale made by a "favored" Volvo dealer to another end user with whom Reeder had no relationship simply is not relevant to proving a violation of the RPA because there was no actual competition between the two dealers at the time of the sales to the separate and different end users.

Without proof of actual competition, Reeder cannot demonstrate a reasonable possibility of competitive injury. Indeed, where alleged lost sales or profits were not diverted from Reeder to "favored" Volvo dealers, but rather to other non-Volvo dealers, it is unclear how any difference in price offered by Volvo to its two dealers could possible injure actual competition between them. See Falls City Indus., 460 U.S. at 437-38 (finding competitive injury based on direct evidence of sales diverted away from plaintiff to a favored customer). Even if Volvo's calculation of concessions caused Reeder to lose profits or sales, there is no violation of the RPA if there is no injury to competition between Reeder and the "favored" Volvo dealers. Furthermore, Volvo can successfully rebut any Morton Salt inference of injury to competition between Reeder and the "favored" Volvo dealers because the evidence clearly establishes that none of the lost sales or profits was diverted from Reeder to those "favored" dealers. Although Volvo's conduct may have injured Reeder's ability to compete with non-Volvo dealers, Reeder must look outside the RPA for any relief

for this claimed injury. Contrary to the court's assertion, such an injury is not the type of injury to competition that the RPA was intended to prevent.

It is my view that an injury to competition can be proven only where the factors necessary to state an RPA claim all are present in the same relevant transaction. To the extent that the court looks for the existence of one factor in one transaction and the existence of another factor in a second transaction, I conclude that the proof in this case is too tenuous and requires too many inferences piled atop inferences to reach the court's result.

Nevertheless, even if we assume that Volvo violated § 13(a) of the RPA, I would reverse Reeder's RPA damage award because Reeder has failed to prove that it was actually injured by Volvo's price discrimination as required by § 15(a). See J. Truett Payne, 451 U.S. at 562 ("To recover treble damages, then, a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent."). Although Reeder may have established that it lost sales and profits to other non-Volvo competitors, there can be no inference of actual injury for the purpose of the RPA without some evidence (and there is none in this record) that the discriminatory pricing caused those sales and profits to be diverted from Reeder to another Volvo dealer who received more favorable terms from Volvo.

Reeder relies on four different scenarios to demonstrate actual injury and to calculate its damages. First, Reeder points to instances in which it bid unsuccessfully against non-Volvo competitors because Volvo failed to quote Reeder the same concession that it gave to a "favored" Volvo dealer in a separate sale to a different end user. Second, Reeder cites instances in which it bid successfully against non-Volvo competitors but did not make as much in profit on the successful deal because it did not receive the same concession that a "favored" Volvo dealer received in an entirely separate sale to an entirely different end

user. Third, Reeder relies on the transaction involving Tommy Davidson in which Reeder and another Volvo dealer, who allegedly received a better concession quote from Volvo, both lost the ultimate sale to a non-Volvo competitor. Finally, Reeder cites to the deal involving Hiland Dairy in which Reeder and another "favored" Volvo dealer both received equal concession quotes from Volvo and submitted equal bids to the same end user. Months later after Volvo's prices had increased, Hiland Dairy placed its order with the "favored" Volvo dealer for reasons unrelated to price, but insisted on receiving the original lower price. The other dealer then requested an additional concession in order to offer Hiland Diary its original quoted price. Notably, Hiland Dairy purchased all of its trucks both before and after this transaction from the same "favored" Volvo dealer. More notably, there is nothing in the evidence to show that had Hiland Dairy made the same request of Reeder that Volvo would not have "favored" Reeder with the same concession in order to get the business.

Although it is possible that Reeder lost sales or profits to non-Volvo dealers because it did not receive a sufficiently high concession from Volvo in the first three scenarios, the difference in concessions offered to Reeder and the "favored" Volvo dealers did not cause the lost sales or profits on those deals. In order to prove that the § 13(a) violation caused its injuries, Reeder essentially must show that absent a price difference, it would not have lost those sales or profits. However, even if Volvo had not offered the "favored" dealers greater concessions, i.e., not discriminated, there still is no proof that Reeder would have made the sales. Furthermore, as to the sales that Reeder did make, it would be improper to calculate lost profits based on what Reeder otherwise characterizes as illegal price discrimination.

The fact that the sales and profits were not diverted from Reeder to "favored" Volvo dealers demonstrates not only a lack of causation of actual injury under § 15(a), but also seriously undermines our court's conclusion that there is any likelihood

of injury to competition between Reeder and the "favored" Volvo dealers. Reeder alleges that Volvo intended to put Reeder out of business. While intent may be relevant to prove a primary-line violation, see Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet, 824 F.2d 582, 595-96 (8th Cir. 1987), cert. denied, 484 U.S. 1010 (1988), it offers nothing in this case. At most, the facts show that Volvo acted unreasonably in failing to give Reeder sufficient concessions to allow it to compete with other non-Volvo dealers. While such conduct may very well give rise to some sort of liability under state law, I conclude that it does not support a judgment for treble damages under the Robinson-Patman Act. I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

REEDER-SIMCO GMC, INC. PLAINTIFF

V. Civil No. 00-2031

VOLVO GM HEAVY TRUCK CORPORATION n/k/a/ VOLVO TRUCKS NORTH AMERICA, INC. DEFENDANTS

JUDGMENT

On the 1st day of March 2002, there came on for consideration the plaintiff's post-verdict motion for treble damages and attorney's fees and costs. For the reasons set forth in the memorandum opinion filed concurrently herewith, the Court finds that the motion should be and hereby is GRANTED.

WHEREFORE, in accordance with the verdict of the jury, (Doc. #94), and the Court's order of January 25, 2002, (Doc. #95), final judgment should be entered in favor of the plaintiff and against the defendant as follows:

IT IS HEREBY ADJUDGED AND DECREED that the plaintiff is awarded damages in the amount of $513,750.00 for its claim under the Arkansas Franchise Practices Act.

IT IS FURTHER ADJUDGED AND DECREED that the plaintiff is awarded damages in the amount of $4,074,000.00 (trebled from the jury award of $1,358,000.000) on the price discrimination claim brought pursuant to the Robinson-Patman Act.

IT IS FURTHER ADJUDGED AND DECREED that, as the prevailing party, the plaintiff is awarded a reasonable attorney's fee of $171,095.00 and $25,175.42 in costs.

Said damage awards shall bear interest at the annual rate of 2.24% from January 24, 2002, the date of the jury's verdict, until paid. The awards for reasonable attorney's fees and costs shall bear interest at the rate of 2.24% per annum from the date of entry of this order until paid.

IT IS SO ORDERED.

/S/ [Robert T. Dawson]
ROBERT T. DAWSON
United States District Judge

[FILED: MAR O1 2002]

[ENTERED ON DOCKET: 3/1/02]

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

REEDER-SIMCO GMC, INC. PLAINTIFF

V. Civil No. 00-2031

VOLVO GM HEAVY TRUCK CORPORATION n/k/a VOLVO TRUCKS NORTH AMERICA, INC. DEFENDANT

ORDER

On this 30th day of April 2002, there came on for consideration the Defendant's renewed motion for judgment as a matter of law or, in the alternative, motion for a new trial or remittur. (Doc. #102). After reviewing the motion, plaintiff's response thereto, and defendant's reply, and based upon the prior rulings of this Court and being well and sufficiently advised, the Court makes its order as follows:

The renewed motion for judgment as a matter of law should be and hereby is DENIED for the same reasons stated on the record during the trial;

The motion for a new trial should be and hereby is DENIED, because no good cause has been shown; and

The motion for remittur should be and hereby is DENIED, because the damage award is not excessive or conscience shocking.

IT IS SO ORDERED.

[FILED: MAY 1 2002]

/S/ [Robert T. Dawson]
Robert T. Dawson
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

REEDER-SIMCO GMC, INC. PLAINTIFF

V. Civil No. 00-2031

VOLVO GM HEAVY TRUCK CORPORATION n/k/a/ VOLVO TRUCKS NORTH AMERICA, INC. DEFENDANT

ORDER

On the 14th day of January 2002, this matter came on for trial to a duly selected jury consisting of eight members, the Honorable Robert T. Dawson presiding. The trial continued over from day to day until the afternoon of January 23, 2002. The case was submitted to the jury on interrogatories and a unanimous verdict was reached as to each interrogatory as follows:

INTERROGATORY NO. 1: Do you find from a preponderance of the evidence that Plaintiff sustained damages?

ANSWER: Yes.

INTERROGATORY NO. 2: Do you find from a preponderance of the evidence that Defendant or Defendant's officer or employee, directly or indirectly, refused to deal with Plaintiff in a commercially reasonable manner and in good faith (see Jury Instruction No. 12)?

ANSWER: Yes.

INTERROGATORY NO. 3: Do you find from a preponderance of the evidence that Plaintiff sustained damages proximately caused by Defendant's conduct?

ANSWER: Yes.

INTERROGATORY NO. 4: If you conclude that Plaintiff is entitled to a verdict under the Arkansas Franchise Practices Act and you answered "yes" to Interrogatory Nos. 1, 2, and 3, then what do you determine to be a fair dollar calculation of the damages incurred by Plaintiff because of Defendant's violation of the Arkansas Franchise Practices Act? (Remember that conduct occurring before February 9, 1997 may not be considered in determining the amount of Plaintiff's damages under the Arkansas Franchise Practices Act.)

ANSWER: $513,750.00

INTERROGATORY NO. 5: Do you find from a preponderance of the evidence that, in one or more instance, the comparative sales by Defendant to Plaintiff and other Volvo dealer occurred at about the same time (see Jury Instruction No. 15)?

ANSWER: Yes.

INTERROGATORY NO. 6: Do you find from a preponderance of the evidence that, in one or more instance, the reasonably contemporaneous, comparative sales by Defendant to Plaintiff and another Volvo dealer involved trucks of like grade and quality (see Jury Instruction No. 16)?

ANSWER: Yes.

INTERROGATORY NO. 7: Do you find from a preponderance of the evidence that, when comparing the reasonably contemporaneous sales of trucks of like grade and quality, Defendant charged different prices to different purchasers in the sales transactions (see Jury Instruction No. 17)?

ANSWER: Yes.

INTERROGATORY NO. 8: Do you find from a preponderance of the evidence that there is a reasonable possibility that discriminatory pricing may harm competition between plaintiff and other retail dealers of Volvo trucks (see Jury Instruction No. 18)?

ANSWER: Yes.

INTERROGATORY NO. 9: Do you find from a preponderance of the evidence that Plaintiff was injured in its business or property because of the Defendant's discriminatory pricing (see Jury Instruction No. 19)?

ANSWER: Yes.

INTERROGATORY NO. 10: Do you find from a preponderance of the evidence that Defendant acted in good faith to meet a competitor's equally low and lawful price when it offered discriminatory prices to certain other retail Volvo dealers?

ANSWER: No.

INTERROGATORY NO. 11: If you conclude that the Plaintiff is entitled to a verdict for price discrimination under the Robinson-Patman Act, what do you determine to be a fair dollar calculation of the damages incurred by Plaintiff because of the price discrimination? (Remember that conduct occurring before February 9, 1996 may not be considered in determining the amount of Plaintiff's damages under the Robinson-Patman Act.)

ANSWER: $1,358,000.00

WHEREFORE, for purposes of any appeal that may be taken from this verdict, this order does not constitute the final judgement in this case. Before a final judgment may be entered, the Court must determine whether Plaintiff may be entitled to an award of treble damages and/or attorneys' fees and costs for either of its claims in accordance with the jury verdict. Accordingly, the Court makes its order as follows:

IT IS ORDERED that within ten days Plaintiff shall submit a brief together with any documentary evidence, including affidavits, that the Plaintiff would have considered by the Court in deciding whether to award treble damages and/or attorneys' fees and costs. The Defendant shall have ten days thereafter to submit its own brief and documentary evidence.

IT IS SO ORDERED.

/S/ [Robert T. Dawson]
Robert T. Dawson
United States District Judge

[FILED: JAN 25 2002]

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

REEDER-SIMCO GMC, INC. PLAINTIFF

V. Civil No. 00-2031

VOLVO GM HEAVY TRUCK CORPORATION n/k/a VOLVO TRUCKS NORTH AMERICA, INC. DEFENDANT

ORDER

On this 3rd day of January 2002, there comes on for consideration the motion for summary judgment filed by Defendant. (Doc. #56). The Court, after a review of the pleadings in the light most favorable to the nonmoving party as required, finds that the motion should be and hereby is GRANTED in part and DENIED in part.

Defendant's motion for summary judgment addresses Plaintiff's claims under the Robinson-Patman Act for primary-line, as well as, secondary-line discrimination. In order to prove primary-line discrimination, Plaintiff must show it was a competitor of Defendant for the direct sales the defendant allegedly made to consumers. Even if Defendant offered Plaintiff the same price as it allegedly offered consumers in direct sales, Plaintiff would have to charge a higher price to the consumers in order to make a profit. *See* Deposition of Bill Hek, Vol. II, p. 345. In such an instance, Plaintiff could not successfully compete with Defendant. Accordingly, Plaintiff is unable to prove primary-line discrimination by Defendant, and summary judgment is appropriate on this claim. *See Conoco, Inc. v. Inman Oil Company, Inc.*, 774 F.2d 895, 903-04 (8th Cir. 1985).

Defendant also moves for summary judgment on Plaintiff's claim for tortious interference with a contractual relationship or business expectancies on the basis that it is barred by the statute of limitations. Plaintiff's response to the summary judgment motion does not address this contention. After viewing the evidence in the light most favorable to Plaintiff, as required, the Court finds that Plaintiff's alleged cause of action for tortious interference accrued more than three years before the filing of its complaint on February 9, 2000. Therefore, Plaintiff's claim for tortious interference should be and hereby is dismissed.

As for the remaining claims of secondary-line discrimination under the Robinson-Patman Act and the violations of the Arkansas Franchise Practices Act, the Court finds there are issues of fact which preclude summary judgment, including, but not limited to, whether Defendant made sales at different prices to two different buyers in violation of the Robinson-Patman Act, whether the alleged lower prices were functionally available to Plaintiff, whether Plaintiff competed within the same geographic market as the allegedly favored purchases and whether Defendant dealt with Plaintiff in a commercially reasonable manner and in good faith as required by the Arkansas Franchise Practices Act.

As reflected above, the motion for summary judgment should be and hereby is GRANTED in part and DENIED in part. Accordingly, Plaintiff's claims for primary-line discrimination under the Robinson-Patman Act and for tortious interference with a contractual relationship or business expectancies are DISMISSED WITH PREJUDICE, but all other claims remain set for the jury trial on January 14, 2002.

IT IS SO ORDERED.

/S/ [Robert T. Dawson]
Honorable Robert T. Dawson
United States District Judge

[FILED: JAN 03 2002]

[ENTERED ON DOCKET:
1/3/02]

APPENDIX F

UNITED STATES COURT OF APPEALSX
FOR THE EIGHTH CIRCUITX

X
No. 03-2462X
X
Reeder-Simco GMC, Inc., *X
*X
Appellee, *X
* Order Denying Petition forX
vs. * Rehearing and for RehearingX
* En BancX
Volvo GM Heavy Truck *X
Corporation, etc., *X
*X
Appellant. *X
X

The motion by the Truck Manufacturers Association toX file an amicus brief has been considered by the court and isX denied.X
X

The petition for rehearing en banc is denied. The petitionX for rehearing by the panel is also denied.X
X

Judge Gruender would grant the petition for rehearing enX banc.X
X

Judge Hansen would grant the petition for panel rehearing.X
X
(5128-010199)X
X

October 6, 2004X
X
X
Order Entered at the Direction of the Court:X
X

X
Clerk, U.S. Court of Appeals, Eighth CircuitX